Supreme Court, U.S.
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No. 96-

IN THE
Supreme Court of the United States
OCTOBER TERM, 1996

SUAREZ CORPORATION INDUSTRIES,
Petitioner,

v.

STATE OF WEST VIRGINIA, BY AND THROUGH DARRELL V. MCGRAW, JR., ATTORNEY GENERAL,
Respondent.

Petition for Writ of Certiorari to the Supreme Court of Appeals of West Virginia

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Whether the State of West Virginia may preliminarily enjoin legitimate commercial speech on the basis of a "minimal evidentiary showing" that the speech is only potentially misleading.

2. Whether the Supreme Court of Appeals of West Virginia erred in applying a *lower* standard of review to an order enjoining commercial speech than the rigorous standard of review the court normally applies to appeals of ordinary civil injunctions in non-First Amendment cases.

3. Whether a court, having found that commercial speech is potentially deceptive, is required to determine whether the preliminary injunctive relief requested by the State is no broader than reasonably necessary to prevent the alleged deception.

PARTIES TO THE PROCEEDING AND RULE 29.6 LIST

Petitioner, Suarez Corporation Industries, was appellant below. Respondent, the State of West Virginia, was appellee below.

Pursuant to this Court's Rule 29.6, petitioner notes that it is an Ohio Corporation and has no corporate parent or nonwholly owned subsidiaries.

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Petition for Writ of Certiorari to the Supreme Court of Appeals of West Virginia

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PETITION FOR WRIT OF CERTIORARI

Suarez Corporation Industries respectfully petitions for a writ of certiorari to review the judgment of the Supreme Court of Appeals of West Virginia.

OPINIONS BELOW

The opinion of the Supreme Court of Appeals of West Virginia is reported at 472 S.E.2d 792 (1996) and is reprinted in the Appendix ("App.") at 1a-36a. The unpublished order of the Supreme Court of Appeals of West Virginia denying Suarez Corporation Industries' petition for rehearing is reprinted at App. 37a.

The original unpublished order of the Circuit Court of Kanawha County (Kaufman, J.) granting respondent's

motion for a preliminary injunction is reprinted at App. 48a-50a. The unpublished order of the Circuit Court of Kanawha County (Canady, J.) modifying the original preliminary injunction is reprinted at App. 38a-47a.

JURISDICTION

On March 20, 1996, the Supreme Court of Appeals of West Virginia affirmed as modified the preliminary injunction imposed by the Circuit Court of Kanawha County on November 3, 1994, severely restricting the contents of direct mail solicitations sent by petitioner to residents in West Virginia. App. 1a-36a. Suarez Corporation Industries filed a timely petition for rehearing, which was denied on June 27, 1996. App. 37a. This Court has jurisdiction pursuant to 28 U.S.C. § 1257(a).

Although styled as a "preliminary injunction," the order below is effectively final. It is well established that the concept of finality is to be given a "practical, rather than a technical construction." *Cohen* v. *Beneficial Indus. Loan Corp.*, 337 U.S. 541, 546 (1949); see also *Cox Broadcasting Corp.* v. *Cohn*, 420 U.S. 469, 477 (1975); *Organization for a Better Austin* v. *Keefe*, 402 U.S. 415, 418 n.* (1971). As a practical matter, the preliminary injunction order affirmed by the Supreme Court of Appeals of West Virginia is final. The question as to when a court may restrict commercial speech prior to a full hearing on the merits of a suit for permanent injunctive relief now has been conclusively decided by the highest court in the State of West Virginia. The Supreme Court of Appeals of West Virginia has held that "a minimal evidentiary showing" will support a preliminary injunction of potentially unlimited duration restraining protected speech. Nothing that happens in any further proceedings will alter the decision of the highest court in the State of West Virginia on that important constitutional issue, which is the issue presented by petitioner for review in this Court. To use the terminology of *Cox Brodcasting*,

this is a "category two" case—a case "in which the federal issue, finally decided by the highest court in the State, will survive and require decision regardless of the outcome of future state-court proceedings." 420 U.S. at 480.

PERTINENT STATUTORY PROVISIONS

This case concerns the West Virginia Prizes and Gifts Act. W. Va. Code §§ 46A-6D-1 to -10 & 46A-7-110. Due to the length of this statute, it is reproduced at App. 63a-68a.

STATEMENT OF THE CASE

Petitioner Suarez Corporation Industries is an Ohio-based corporation employing nearly 1000 people that sells household accessories, jewelry, computer equipment, sports equipment, and other assorted wares directly to the consumer. To generate interest in the advertising campaigns for the merchandise it offers for sale, petitioner often includes in its mailer a notification that the recipient has won a prize or has been entered in a sweepstakes or is eligible to enter a sweepstakes in which he may win a prize. In all such solicitations, receipt of the prize or participation in the sweepstakes is not contingent upon making a purchase from petitioner. The recipient need do nothing more than notify the company that he wishes to claim his prize or participate in the sweepstakes. He can so notify the company in one of two ways: He can make a purchase, which constitutes an automatic claim of the corresponding prize or entry in the corresponding sweepstakes, or, without making a purchase, he can send the company a sweepstakes entry, which also constitutes a claim of the prize or entry in the sweepstakes. Since 1990, petitioner has awarded tens of millions of dollars in cash and prizes to individuals. In all cases no purchase was required.

Suit Initiated by Attorney General of West Virginia

In January 1994, the Attorney General of the State of West Virginia moved to preliminarily enjoin the solicitations of four companies, unrelated to petitioner, that engage in direct mail or over-the-phone consumer sales, claiming that these defendants were violating West Virginia's Prizes and Gifts Act of 1992, W. Va. Code §§ 46A-6D-1 to -10. App. 63a-68a. The Attorney General invoked his authority to seek a preliminary injunction against the alleged violators pursuant to West Virginia Code § 46A-7-110. App. 68a. In August 1994, the Attorney General attempted to add 102 companies to the list of defendants, in effect trying to create one omnibus lawsuit with 106 unrelated defendants.

Petitioner published a two-page advertisement in the Charleston Gazette protesting the abusive behavior of the Attorney General.[1] In retaliation for the critical advertisement, the Attorney General suspended efforts to seek preliminary injunctive relief against the other 105 defendants, and focused all of his litigation energy on attacking petitioner. According to the Attorney General, the suit against petitioner would be a test case for enforcement of the West Virginia Prizes and Gifts Act. Transcript ("Tr.") of Oct. 5, 1994 Hearing, at 14, 17-18 (App. 51a-53a).

A cursory hearing before Judge Kaufman in the Circuit Court of Kanawha County, in which petitioner was prevented by the Court from presenting testimony from critical witnesses, led to a blanket injunction against any communication by petitioner with potential customers in

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[1] Soon after the litigation began, the court ordered the Attorney General to allow the defendants to inspect his case file. That file contained zero formal complaints against petitioner. This record is remarkable, given that petitioner had engaged in more than 100,000 transactions per year in West Virginia for several years prior to the complaint.

West Virginia. App. 48a-50a. Petitioner then sought to dissolve this injunction, which unquestionably violated its rights under the First Amendment of the Constitution.

Upon petitioner's motion to dissolve the preliminary injunction, a hearing was held before Judge Canady of the Circuit Court of Kanawha County. Evidence at that hearing included the testimony of three of petitioner's West Virginia customers, all of whom stated that they were pleased with the quality of the company's merchandise and service, that they fully understood the solicitations they received from petitioner, and that they never had been misled by its offers of prizes or by rules for sweepstakes participation. Tr. of Oct. 5, 1994 Hearing, at 36-37 (test. of Emerson S. Clopper); *id.* at 75-76, 79-80 (test. of Catherine C. Perdue); Tr. of Oct. 12, 1994 Hearing, at 63-65 (test. of Janice M. Estep). App. 53a-62a. By contrast, the State presented no evidence at this hearing that any resident of West Virginia actually had been misled or deceived by petitioner's direct mail sales promotions.

Although Judge Canady agreed that the injunction as crafted by Judge Kaufman could not stand, he declined to dissolve the injunction. Instead, he issued an order on November 3, 1994 modifying the injunction by articulating eight restrictions on petitioner's communications with residents in West Virginia. The text of the injunction as modified is reprinted in the Appendix. App. 38a-47a.

The Preliminary Injunction

In several important respects, the preliminary injunction order issued by Judge Canady restricts petitioner's ability to communicate with customers and potential customers in ways not envisioned by the Prizes and Gifts Act. First, the injunction prohibits petitioner from:

> [s]oliciting consumers in West Virginia with an offer which denominates an item as a prize, gift, award, premium, or similar term that implies the item is free

> whether stated or represented in any way, when the intended recipient is required to spend any sum of money to make meaningful use of it.

App. 45a.

This provision introduces the concept of "meaningful use," which is foreign to the Prizes and Gifts Act. Under the Act, as long as an item is given "without obligation" within ten days of the representation that a person has "won" the item, it may be called a "prize" or "gift." W. Va. Code § 46A-6D-3(a). The injunction now injects a subjective element into the definitions of "prize" and "gift." Under the injunction, the Circuit Court of Kanawha County becomes the arbiter of whether an item offered to a customer has sufficiently inherent "meaningful use" to qualify as a prize or gift. In arrogating this role to itself, the court necessarily intrudes on petitioner's ability to communicate with its customers in a way not contemplated by the Act. If petitioner offers its customers "gifts" that the Circuit Court of Kanawha County deems to be insufficiently "meaningful," petitioner risks contempt sanctions for violating the injunction.

Second, the injunction prohibits petitioner from using "official sounding language and seals such as: *Judges Seal, Office of the Treasurer, Claim Processing Division* that may lead a reasonable person to believe he or she has won anything of value." App. 46a. By its terms, this portion of the injunction applies even if petitioner in fact bestows something "of value" on one of its customers. Like the "meaningful use" requirement, this provision lacks any support in the Prizes and Gifts Act. The Act proscribes use of language that would lead someone to believe he has won a prize only where he has not, in fact, won a prize. W. Va. Code § 46A-6D-3. The injunction, by contrast, proscribes use of such language even where the recipient has, in fact, won a prize.

Third, the injunction prohibits petitioner from "sending solicitations that represent that the recipient has been

specially selected when in fact the solicitation is part of a mass mailing." App. 46a. This provision imposes a major constraint not envisioned by the West Virginia Legislature. The Act prohibits informing a person that he has been "specially selected . . . unless the selection process is designed to reach a particular type or types of persons." W. Va. Code § 46A-6D-5(a). In crafting the injunction, the Circuit Court of Kanawha County made the illogical assumption that a mass mailing is inconsistent with special selection. Contrary to common sense, the court assumed that the size of a group, rather than any common characteristic shared by its members, is the determinant of "special selection."

In sum, the injunction acts as a blatant prior restraint on petitioner's commercial speech. For that reason the Supreme Court of Appeals granted petitioner's request for review.

Review by the Supreme Court of Appeals of West Virginia

The substance of the injunction of the Circuit Court of Kanawha County was affirmed by the Supreme Court of Appeals of West Virginia in its opinion filed March 20, 1996. The only amendment to the injunction made by that court was the addition of a termination date, set at 180 days from issuance of that court's mandate. App. 32a. However, even this limitation was effectively vitiated by the court's statement at the end of its opinion that "the time period may be extended by the trial court in its *unfettered discretion*." App. 36a n.53 (emphasis added).

The opinion of the Supreme Court of Appeals of West Virginia in this case is remarkable for three glaring errors, which are the basis of petitioner's request for review by this Court. First, in setting forth the framework in which to analyze the facts of this case, the West Virginia Court found that the State's burden in obtaining a preliminary injunction was to come forward with only "*a minimal evidentiary showing* of good reason to believe that the essential elements of a violation of the [Prizes and Gifts]

Act are in view." App. 10a (emphasis added). By this standard, the State need not demonstrate that it is likely to suceed on the merits of its case, nor that a balancing of the equities favors a preliminary injunction. The West Virginia Court expressly contrasted the standard applied in this case to the "customary standard" applied in evaluating a preliminary injunction, whereby a plaintiff "must demonstrate *by a clear showing*" likelihood of success on the merits, irreparable harm, absence of an adequate remedy at law, and a balancing of the equities in favor of a preliminary injunction. App. 10a n.8.

Second, the West Virginia Supreme Court of Appeals compounded its first error by describing its own standard of review as "deferential," App. 9a, and "more narrow than the typical motion for a preliminary injunction." App. 10a. Incredibly, in seeking to restrain speech protected by the Constitution such as petitioner's, not only does the State enjoy an extraordinarily low threshold of proof before the Circuit Court, but when it gets to the Supreme Court of Appeals of West Virginia it receives an unusually "deferential" standard of review.

Finally, in analyzing the level of protection due petitioner's commercial solicitations under the First Amendment, the court misapplied the analytical test articulated by this Court in *Central Hudson Gas & Electric Corp.* v. *Public Service Commission*, 447 U.S. 557 (1980). Based on its agreement with the Circuit Court of Kanawha County that petitioner's *past* solicitations could have been "misleading and deceptive," the Court found that it "need . . . go no farther" in determining whether the preliminary injunction, which imposes restrictions on the contents of petitioner's *future* solicitations, bears a reasonable relation to the State's interest in prohibiting deceptive commercial speech. App. 31a. Under this theory, once a court finds that past commercial solicitations may have been deceptive or misleading it has carte blanche to im-

pose any restrictions, reasonable or unreasonable, on the speaker's future solicitations.

In addition to the foregoing legal errors, the decision of the Supreme Court of Appeals of West Virginia is replete with unsupported findings of fact and disparaging remarks about petitioner's merchandise. Repeatedly, the court characterized the gifts that petitioner offers to potential customers as being "of questionable value," App. 8a, or "basically worthless," App. 11a, 19a. In describing one of petitioner's promotions, the court erroneously found that the company has issued "simulated check[s]," App. 18a, in violation of the Prizes and Gifts Act, when, in fact, the record shows that the checks issued in connection with this promotion were *real checks*, redeemable for cash at any recipient's bank. *E.g.*, Hearings of Oct. 5 & 12, 1994, Plaintiff's Ex. 3-1.

Based on its "minimal evidence" standard for imposing a preliminary injunction and its "deferential" standard of review, the Supreme Court of Appeals of West Virginia affirmed the substance of the preliminary injunction issued by the Circuit Court of Kanawha County. The Supreme Court of Appeals attached a time limit to the injunction, App. 32a, but then rendered its own modification superfluous by authorizing the Circuit Court of Kanawha County to exercise "unfettered discretion" in extending the time limit. App. 36a n.53.

Citing the foregoing errors, petitioner filed a timely application for rehearing by the Supreme Court of Appeals of West Virginia. That application was denied by order dated June 27, 1996. App. 37a.

Petitioner now seeks a writ of certiorari for this Court to review the preliminary injunction affirmed as modified by the Supreme Court of Appeals of West Virginia.

REASONS FOR GRANTING THE PETITION

This case raises three important questions, as yet undecided by this Court, concerning the level of protection accorded commercial speech by the First Amendment. This Court has made it clear that commercial speech is entitled to protection under the First Amendment, *Virginia State Bd. of Pharmacy* v. *Virginia Citizens Consumer Council, Inc.*, 425 U.S. 748 (1976); that the level of protection accorded commercial speech is lower than the level of protection accorded "pure" speech, *Ohralik* v. *Ohio State Bar Ass'n*, 436 U.S. 447, 456 (1978); and that actually or inherently misleading or deceptive commercial speech is accorded no protection at all. *Friedman* v. *Rogers*, 440 U.S. 1, 9 (1979). Additionally, this Court has held that regulatory restrictions on *potentially* deceptive speech "may be no broader than reasonably necessary to prevent the deception." *In re R.M.J.*, 455 U.S. 191, 203 (1982). However, this Court has not yet established the ground rules that courts must follow in deciding whether to preliminarily restrain commercial speech which they find to be potentially deceptive in advance of a full hearing on the merits. The gross errors made by both the Circuit Court of Kanawha County and the Supreme Court of Appeals of West Virginia in this case in restraining petitioner's commercial speech demonstrate the need for this Court to articulate such ground rules.

The Supreme Court of Appeals of West Virginia made at least three errors of constitutional proportion. First, rather than apply the preliminary injunction standard that is used even when the activity enjoined is not protected by the First Amendment, the court applied a *lower* standard in deciding whether to enjoin protected speech. Instead of weighing the relative interests at stake, the potential injury to petitioner, and the likelihood of the State's success on the merits, the West Virginia Court simply found that "a minimal evidentiary showing" could support a prior restraint of petitioner's speech. App. 10a.

Second, the court erroneously found that its scope of review of a preliminary injunction restraining protected speech should be "more narrow than the typical motion for a preliminary injunction," again giving no weight to petitioner's legitimate First Amendment concerns. App. 10a. Finally, upon an unsupported finding that petitioner's speech may be misleading and deceptive, App. 31a, the Supreme Court of Appeals declined to consider whether the preliminary injunction fashioned by the Circuit Court of Kanawha County was no broader than reasonably necessary to prevent the perceived deception. Each of the foregoing errors raises an important question under the First Amendment to the Constitution of the United States, as applied to the States by the Fourteenth Amendment. Accordingly, this Court should grant certiorari to clarify the standards that state and federal courts must follow in determining whether to preliminarily enjoin protected commercial speech.

I. THE DECISION OF THE COURTS BELOW TO PRELIMINARILY ENJOIN COMMERCIAL SPEECH BASED ONLY ON "A MINIMAL EVIDENTIARY SHOWING" RAISES AN IMPORTANT QUESTION UNDER THE FIRST AMENDMENT TO THE CONSTITUTION.

The judgment of the Supreme Court of Appeals of West Virginia affirming the injunction imposed by the Circuit Court of Kanawha County demonstrates the need for this Court to fill a gap in its commercial speech line of cases. The gap concerns the standard a court must apply in deciding whether to restrain commercial speech in advance of a hearing on the merits as to whether the commercial speech is misleading or deceptive. The Court expressly left that question unanswered in *Virginia State Board of Pharmacy* v. *Virginia Citizens Consumer Council, Inc.*, 425 U.S. 748 (1976). There, the Court simply suggested that certain protections accorded noncommercial speech might not apply to commercial speech,

without elaborating on this suggestion. See *id.* at 772 n.24.

Following *Virginia State Board,* this Court has decided several cases in which it further defined the level of protection to be accorded commercial speech. The Court reaffirmed that, while protected, commercial speech ranks below "pure" speech on the First Amendment hierarchy and is, therefore, subject to some regulation. *Ohralik* v. *Ohio State Bar Ass'n,* 436 U.S. 447, 456 (1978). Further, the Court made clear that at the bottom of the First Amendment hierarchy is commercial speech found to be actually or inherently deceptive or misleading. The latter category of speech is entitled to no protection at all. *Friedman* v. *Rogers,* 440 U.S. 1, 9 (1979); *Bates* v. *State Bar,* 433 U.S. 350, 383 (1977). Later cases have concerned (1) whether particular speech is misleading or deceptive, *e.g., Ibanez* v. *Florida Dep't of Business & Professional Regulation,* 114 S. Ct. 2084 (1994); *Peel* v. *Attorney Registration & Disciplinary Comm'n,* 496 U.S. 91 (1990); *Zauderer* v. *Office of Disciplinary Counsel of the Ohio Supreme Court,* 471 U.S. 626, 644 (1985); *In re R.M.J.,* 455 U.S. 191 (1982), and (2) whether regulation of non-deceptive/non-misleading speech is proportionate to the State's interest, *e.g., Rubin* v. *Coors Brewing Co.,* 115 S. Ct. 1585 (1995); *City of Cincinnati* v. *Discovery Network, Inc.,* 507 U.S. 410 (1993); *Board of Trustees of the State Univ. of N.Y.* v. *Fox,* 492 U.S. 469 (1989). These cases have *not* addressed the important question presented by the instant case: What burden of proof does the First Amendment require to support a preliminary injunction on commercial speech claimed to be potentially misleading?

This Court has drawn a distinction between speech that is actually or inherently misleading, on the one hand, and speech that is only potentially misleading, on the other. While the former may be banned, *Central Hudson Gas & Elec. Corp.* v. *Public Serv. Comm'n,* 447 U.S.

557, 564 (1980), the latter is still within the scope of the First Amendment's protection. Thus, in *In re R.M.J.*, 455 U.S. 191 (1982), this Court held that "the States may not place an absolute prohibition on certain types of *potentially* misleading information." *Id.* at 203 (emphasis added); see also *Zauderer*, 471 U.S. at 644 (potential that attorney advertising may be misleading does not justify "prophylactic rule" banning certain advertising). In *Peel* v. *Attorney Registration & Disciplinary Commission*, 496 U.S. 91 (1990), a plurality of the Court found that the potential that accurate information set out on a lawyer's letterhead stationary might mislead consumers "does not satisfy the State's *heavy burden* of justifying a categorical prohibition against the dissemination of accurate factual information to the public." *Id.* at 109 (plurality op.) (emphasis added); *id.* at 111 (Marshall, J., concurring in the judgment) (rejecting ban on *potentially* misleading commercial speech). And, more recently, this Court has underscored that it will not permit "rote invocation of the words 'potentially misleading' " as an excuse for restricting commercial speech. *Ibanez*, 114 S. Ct. at 2090. See also *Edenfield* v. *Fane*, 507 U.S. 761, 768-69 (1993) (where restriction captures both nondeceptive and deceptive speech, it is state's burden to show that "restriction serves a substantial state interest and is designed in a reasonable way to accomplish that end.").

The speech at issue in this case is alleged to be potentially misleading.[2] There has been no showing that the

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[2] Thus, this case is factually distinguishable from two cases that pre-date this Court's modern line of commercial speech cases, in which the Court affirmed injunctions against *actually* misleading commercial speech. In *FTC* v. *Standard Education Society*, 302 U.S. 112 (1937), the Court considered solicitations for sales of encyclopedias, whereby bound volumes were offered for "free," and looseleaf supplements were sold for $69.50. A cease and desist order issued by the Federal Trade Commission was upheld where evidence in the record showed that customers were *actually deceived* by the solicitation. *Id.* at 117. In *Donaldson* v. *Read Maga-*

speech is actually or inherently misleading. As the court below stated, the only question at this stage is whether "the essential elements of a violation of the [Prizes and Gifts] Act are in view," App. 10a, and a finding that petitioner's speech is " 'actually misleading' . . . [is] not a necessary predicate to support a temporary injunction under W. Va. Code 46A-7-110 (1974)." App. 22a. The court below expressly held that the State may prevail by making only a "minimal evidentiary showing." App. 10a. According to that court, the State is *not* required to overcome a "heavy burden," *Peel,* 496 U.S. at 109, in order to enjoin speech it claims to be potentially misleading.

Although recognizing that its injunction amounts to a prior restraint on petitioner's ability to communicate with customers, App. 31a, the West Virginia Court set an extremely low threshold for the State to pass in order to obtain that injunction. Indeed, it expressly found that the State need not satisfy the "customary standard" for obtaining a preliminary injunction against ordinary activity, that is:

> a *clear showing* of a reasonable likelihood of the presence of irreparable harm; the absence of any other appropriate remedy at law; and the necessity of a balancing of hardship test including: "(1) the likelihood of irreparable harm to the plaintiff without the injunction; (2) the likelihood of harm to the defendant with an injunction; (3) the plaintiff's likelihood of success on the merits; and (4) the public interest."

App. 10a n.8 (citations omitted) (emphasis added).

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zine, 333 U.S. 178 (1948), publishers of a "puzzle contest" challenged a fraud order issued by the U.S. Postmaster General. This Court upheld the order, finding that its "future effect is merely to enjoin the continuation of conduct found fraudulent." *Id.* at 191. In the instant case, by contrast, the preliminary injunction goes much further and enjoins speech found by the courts below to be at most potentially misleading.

Under the standard articulated by the West Virginia Court, it is easier for the State to obtain a preliminary injunction against speech protected by the First Amendment than it is to obtain a preliminary injunction against other, non-speech activities. This standard takes speech from its paramount constitutional position and relegates it to a place where it is more vulnerable to prior restraint than any other activities. That inversion of constitutional priorities is plainly contrary to the guidance provided by this Court. See, *e.g.*, *44 Liquormart, Inc.* v. *Rhode Island*, 116 S. Ct. 1495, 1512 (1996) (plurality op.) ("text of the First Amendment makes clear that the Constitution presumes that attempts to regulate speech are more dangerous than attempts to regulate conduct.")

This case highlights why, contrary to the position adopted by the Supreme Court of Appeals of West Virginia, the State must be required to overcome a heavy burden to enjoin commercial speech alleged to be potentially misleading. Petitioner mails out tens of millions of solicitations each year. It is inevitable that in such widespread mailings, an occasional piece of mail will fall into the hands of a particularly credulous person who claims to be confused by the solicitation. If the State were empowered to silence commercial speech based on the aberrational case of an allegedly confused reader who attaches a logically unfounded interpretation to a mailing he receives, the First Amendment protection accorded commercial speech would be eviscerated.

The record of the proceedings in this case show that people actually understood petitioner's mailings. See App. 53a-62a (testimony at preliminary injunction hearing by recipients of petitioner's solicitations). Nevertheless, the Attorney General of West Virginia has tried to conjure up a specter of deception based on the proposition that unusually credulous persons may have been misled by what was easily understandable and readily understood by average consumers. And, in articulating an extra-

ordinarily low standard to be met in order to obtain a preliminary injunction, the courts below have eliminated the barriers meant to prevent such abuse by the State.

The preliminary injunction standard adopted by the court below confuses this Court's statements regarding commercial speech. In finding commercial speech entitled to a lesser degree of protection than pure speech, this Court has not adopted a lower evidentiary standard for preliminarily enjoining commercial speech. The special status accorded commercial speech simply means that the State may regulate the contents of commercial speech where it would not be allowed to do so with respect to "pure" speech. See *Ohralik*, 436 U.S. at 456. However, that power does not, in turn, imply a power to restrain speech pursuant to a lower quantum of proof of wrongdoing than the State would be required to proffer to restrain any other activity. To the contrary, where states have sought to restrain commercial speech by statute or regulation, this Court consistently has held that they face a heavy burden. See *Peel*, 496 U.S. at 109 (plurality op.) (citing *In re R.M.J.*, 455 U.S. at 203); *Zauderer*, 471 U.S. at 644. It follows naturally that where states attempt to accomplish the same ends through the "extraordinary and drastic" means of preliminary injunction, see 11A Charles A. Wright *et al.*, *Federal Practice and Procedure* § 2948, at 129 (1995) (citing *Sampson* v. *Murray*, 415 U.S. 61 (1974), among other cases), they must face at least as heavy a burden. See *Madsen* v. *Women's Health Ctr., Inc.*, 114 S. Ct. 2516, 2524-25 (1994) (injunctions require greater scrutiny than legislative or regulatory restrictions, because they "carry greater risks of censorship and discriminatory application than do general ordinances"); *id.* at 2539 (Scalia, J., dissenting) ("the injunction is a much more powerful weapon than a statute, and so should be subjected to greater safeguards"); *Beneficial Corp.* v. *FTC*, 542 F.2d 611, 620 (3d Cir. 1976) ("any prior restraint is suspect"), *cert. denied*, 430 U.S. 983 (1977).

Indeed, unlike the courts below in this case, several courts faced with the question whether to preliminarily enjoin commercial speech have applied what the West Virginia Supreme Court of Appeals refers to as the "customary" preliminary injunction standard. These courts require not merely a minimal evidentiary showing, but rather, a showing of probable success on the merits and a balancing of equities in order to obtain a preliminary injunction. See, *e.g.*, *Fargo Women's Health Org., Inc.* v. *Larson*, 381 N.W.2d 176, 179 (N.D.) ("Women's Health made a sufficient showing at this preliminary stage of the proceedings, with adequate allegations and supporting affidavits, to show probable success on the merits so as to justify the imposition of the preliminary injunction."), *cert. denied*, 476 U.S. 1108 (1986); *Marcus* v. *Jewish Nat'l Fund (Keren Kayemeth Leisrael), Inc.*, 557 N.Y.S.2d 886, 889 (N.Y. App. Div. 1990) (where plaintiff sought preliminary injunction of allegedly misleading charitable solicitations, "only question before the court is whether plaintiffs have shown a likelihood of success on the merits, irreparable injury absent preliminary relief and a balancing of the equities in their favor"); *Diamond Co.* v. *Gentry Acquisition Corp.*, 531 N.E.2d 777, 778-79 (Ohio C.P. 1988) (applying customary standard where petitioner seeks to preliminarily enjoin commercial speech). In the sole case relied upon by the court below for the proposition that courts are less reluctant to impose prior restraints in the context of misleading or deceptive speech, *United States Postal Serv.* v. *Athena Prods., Ltd.*, 654 F.2d 362 (5th Cir. 1981), *cert. denied*, 456 U.S. 915 (1982) (cited below, App. 31a), the Fifth Circuit observed:

> the district court appears to have operated in much the same way as if it were evaluating an attempt to show 'probable success on the merits' in the usual preliminary injunction hearing. *Other courts behave similarly.*

Id. at 368 n.7 (citing *United States Postal Serv.* v. *Oriental Nurseries*, 491 F. Supp. 1265 (S.D. Fla. 1980)) (emphasis added).[3]

Thus, the requirement in this case that the State pass only a "minimal" evidentiary threshold in order to obtain a preliminary injunction against petitioner is contrary to the trend indicated by this Court's commercial speech decisions, and it is contrary to the standard expressly applied by other state and federal courts. In citing *Athena Products* to justify the imposition of a prior restraint in this case, the Supreme Court of Appeals of West Virginia plainly has converted this Court's statements concerning the special status of commercial speech within the First Amendment rubric into a license to apply a less demanding standard for issuing a preliminary injunction than in non-speech contexts. That conclusion cannot be reconciled with this Court's reasoning concerning the protection accorded commercial speech alleged to be potentially misleading. Certiorari should be granted in this case in order to clarify that the special status of commercial speech does not authorize an inversion of constitutional priorities, rendering such speech less protected from prior restraint than any other commercial activities.

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[3] In *United States* v. *Weingold*, 844 F. Supp. 1560 (D.N.J. 1994), a case in which the U.S. Postal Service sought to preliminarily enjoin certain potentially misleading solicitations, the court distinguished the "probable cause" standard, set forth in 39 U.S.C. § 3007, from the customary preliminary injunction standard, set forth in Fed. R. Civ. P. 65. *Id.* at 1571. However, even as it distinguished the two standards, the court stated that under the probable cause standard, the Postal Service must make its case by a "preponderance of the evidence," *id.*, not, as in this case, by a mere "minimal evidentiary showing." App. 10a.

II. THE DECISION OF THE SUPREME COURT OF APPEALS OF WEST VIRGINIA TO APPLY A "NARROW" APPELLATE REVIEW OF THE INJUNCTION ISSUED BY THE CIRCUIT COURT OF KANAWHA COUNTY NULLIFIES THE SPECIAL PROTECTION OF THE FIRST AMENDMENT AND DEMONSTRATES THE NEED FOR CLARIFICATION BY THIS COURT.

The Supreme Court of Appeals of West Virginia compounded its error in setting a low burden of proof for imposition of a preliminary injunction by asserting an equally low standard of review for itself. The Court described its review of the preliminary injunction issued by the Circuit Court of Kanawha County as "deferential," App. 9a, and "more narrow than the typical motion for a preliminary injunction," App. 10a. Like its first error, the West Virginia Court's second error confuses this Court's statements concerning the protection accorded commercial speech. The standard of review as articulated by the Supreme Court of Appeals of West Virginia once again inverts the relationship between speech and other activity, assigning speech a lower level of protection. Certiorari should be granted so that this Court may clarify that the lower position of commercial speech on the First Amendment hierarchy does not warrant a lower level of scrutiny by appellate courts reviewing preliminary injunctions against commercial speech.

Normally, the fact that speech is alleged to be protected by the First Amendment is cause for an appellate court to apply a more searching review of a lower court's decision, not a deferential review. See *Bose Corp.* v. *Consumers Union of U.S., Inc.*, 466 U.S. 485, 505 (1984) ("the Court has regularly conducted an independent review of the record both to be sure that the speech in question actually falls within the unprotected category and to confine the perimeters of any unprotected category within acceptably narrow limits in an effort to ensure that protected expression will not be inhibited"); see also *Peel,*

496 U.S. at 108 (plurality op.) ("Whether the inherent character of a statement places it beyond the protection of the First Amendment is a question of law over which Members of this Court should exercise *de novo* review."). Other courts, too, have described the question whether particular speech is beyond First Amendment protection as a question of law, subject to *de novo* review on appeal. See, *e.g.*, *Beneficial Corp.*, 542 F.2d at 618-19 (where FTC issued cease and desist order as to certain commercial speech, court of appeals applied "examination of the Commission's action that is more searching than in other contexts"); *Desnick* v. *Department of Professional Regulation*, 665 N.E.2d 1346, 1356 (Ill. 1996) ("In cases raising first amendment issues, particularly ones in which it is contended that a communication is unprotected, a reviewing court undertakes an independent examination of the entire record."); *People* v. *Morse*, 21 Cal. App. 4th 259, 265 (Ct. App. 1st Dist. 1993) ("Whether the inherent character of a statement places it beyond the protection of the First Amendment is a question of law which we must determine after independently reviewing the record."), *cert. denied*, 115 S. Ct. 83 (1994).

Like its finding that a preliminary injunction against commercial speech need be supported by nothing more than a "minimal evidentiary showing," App. 10a, the West Virginia Court's application of a deferential standard of review appears to rest on a misunderstanding of what this Court has said regarding potentially deceptive commercial speech. The West Virginia Court apparently concluded that once speech is alleged to be potentially misleading, the normal safeguards limiting the imposition of prior restraints are no longer applicable. This Court's statements regarding potentially misleading commercial speech do not support that conclusion. In fact, this Court's statements support the opposite conclusion. The allegation that particular speech is beyond the scope of the First Amendment and is, therefore, subject to prior restraint is precisely the circumstance warranting the most

scrupulous application of the safeguards limiting the imposition of prior restraints. Those safeguards include careful review by appellate courts.

This Court should grant certiorari to clarify that the ranking of commercial speech below "pure" speech does not deprive commercial speech of procedural safeguards limiting the imposition of prior restraints. Far from requiring a deferential standard of review, the mere possibility that speech is protected and therefore would be subject to prior restraint requires an appellate court to apply a stricter than ordinary standard of review. *Bose Corp.*, 466 U.S. at 505.

III. THE FAILURE OF THE COURT BELOW TO ANALYZE THE REASONABLENESS OF THE INJUNCTION ISSUED BY THE CIRCUIT COURT OF KANAWHA COUNTY DEMONSTRATES THE POTENTIAL FOR GROSS ABUSE ABSENT CLARIFICATION FROM THIS COURT OF THE REQUIREMENTS FOR IMPOSING PRIOR RESTRAINTS ON COMMERCIAL SPEECH.

Finally, this case raises the important question whether, having found past commercial speech to be potentially deceptive, a court must examine the reasonableness of a preliminary injunction that covers more than the contents of past solicitations. In a misapplication of this Court's *Central Hudson* test, the West Virginia Court found petitioner's past commercial solicitations to have been potentially misleading, and therefore declined to proceed with its analysis, to determine whether the injunction on future solicitations is sufficiently narrow to pass muster under the First Amendment. That approach effectively deprives a party of any protection once a court finds that past speech may have been potentially misleading or deceptive. That determination having been made, according to the West Virginia Court, any preliminary injunction imposed is beyond review. This Court should resolve the important question raised by this case as to how to apply

the Court's *Central Hudson* analysis, following a finding that past speech may have been misleading or deceptive.

In *Central Hudson*, this Court stated that, "[f]or commercial speech to come within [the First Amendment], it at least must concern lawful activity and not be misleading." 447 U.S. at 566. Once those criteria are established, a court asks "whether the asserted governmental interest [in regulating the speech] is substantial." *Id.* If this hurdle is passed, a court next determines "whether the regulation directly advances the governmental interest asserted." *Id.* Finally, a court asks whether the regulation "is not more extensive than is necessary to serve that interest." *Id.*

In cases decided since *Central Hudson*, this Court has made clear that *potentially* misleading speech, as distinct from *actually* or *inherently* misleading speech, is still subject to First Amendment protection. Any attempt to regulate such speech is subject to analysis under all prongs of the *Central Hudson* test. For instance, in *In re R.M.J.*, 455 U.S. 191 (1982), where the Missouri Supreme Court sought to limit certain forms of advertising by lawyers, this Court invoked the *Central Hudson* criteria, stating that restrictions on speech targeted at potential deception "may be no broader than reasonably necessary to prevent the deception." *Id.* at 203. The Court reiterated that point in *Zauderer*, in response to the argument of the Office of Disciplinary Counsel of the Supreme Court of Ohio that certain restrictions on attorney advertising were needed as a "prophylactic rule" to prevent consumer deception. 471 U.S. at 644. And, the Court applied its *Central Hudson* analysis to a regulation requiring that attorney advertisements referring to contingent-fee arrangements mention a client's liability for costs, even after finding that bald reference to contingent-fee arrangements held "the possibility of deception." *Id.* at 652. Similarly, in both the plurality and concurring opinions in *Peel*, members of this Court found that where speech is only *po-*

tentially misleading, a "categorical prohibition" on that speech will not survive First Amendment scrutiny, and a narrower limitation must be crafted. 496 U.S. at 109 (plurality op.); *id.* at 111 (Marshall, J., concurring in judgment). *Cf. Bose*, 466 U.S. at 505 (finding that allegation that speech is unprotected must be scrutinized carefully in order, *inter alia*, "to confine the perimeters of any unprotected category within acceptably narrow limits in an effort to ensure that protected expression will not be inhibited.").

Following this Court's teachings, federal and state courts have applied the *Central Hudson* analysis to attempts to regulate commercial speech, even after those courts have found the subject speech to be potentially deceptive. Indeed, in *SEC* v. *Suter*, 732 F.2d 1294 (7th Cir. 1984), the Seventh Circuit applied *Central Hudson* to a preliminary injunction imposed on an investment advisor whose past solicitation materials were found to be *actually* misleading in numerous respects. According to the court, his solicitations "falsely use other's names to praise Suter's ability. They blatantly lie about his experience, education and qualification. Finally, they unashamedly carry a worthless money-back guarantee." *Id.* at 1299. Yet, having made that finding, the court went on to review the preliminary injunction imposed by the district court according to this Court's *Central Hudson* test. *Id.* ("failure to meet the first step of the *Central Hudson Gas* analysis will not deny a professional his first amendment protection"). See also *Association of Nat'l Advertisers, Inc.* v. *Lungren*, 44 F.3d 726, 732 (9th Cir. 1994) (applying *Central Hudson* analysis after finding that use of certain terms in marketing of consumer goods was "only 'potentially misleading' "), *cert. denied*, 116 S. Ct. 62 (1995); *Parker* v. *Commonwealth of Ky. Bd. of Dentistry*, 818 F.2d 504, 509 (6th Cir. 1987) (to regulate speech that is only potentially misleading "state must articulate a substantial interest, and the regulation must be narrowly tailored to meet that interest").

Similarly, in *Fargo Women's Health Organization, Inc.* v. *Larson*, 381 N.W.2d 176 (N.D.), *cert. denied*, 476 U.S. 1108 (1986), the Supreme Court of North Dakota reviewed a preliminary injunction under the full *Central Hudson* analysis, even after noting its agreement with the lower court that the plaintiff had made a sufficient showing of "false and deceptive advertising" by the defendant. 381 N.W.2d at 179. The defendant in that case was a health clinic that led potential clients to believe that it performed abortions, and then, when clients visited the clinic, attempted to persuade them not to obtain abortions. The preliminary injunction was addressed wholly to defendant's past speech, prohibiting defendant, for instance, " 'from falsely and deceptively advertising that they provide elective abortions and financial assistance for such services.' " *Id.* at 178 (quoting injunction). Applying *Central Hudson*, the State Supreme Court upheld the preliminary injunction upon noting, *inter alia*, "the narrowness with which the order was drawn." *Id.* at 182.

In *United States* v. *Weingold*, 844 F. Supp. 1560 (D. N.J. 1994), the court considered the government's request for a preliminary injunction against several defendants involved in various commercial solicitations concerning a variety of claims, including alleged psychic powers and ability to help customers win lotteries. The court found that the solicitations were "designed to create false impressions, mislead the recipients and manipulate the general public." *Id.* at 1570. Having made that finding, the court nevertheless acknowledged that it "may not issue an injunction that is broader than necessary to restrain the unlawful conduct." *Id.* at 1575.

In addition to the foregoing illustrations, several federal cases pre-dating *Central Hudson* relied on earlier decisions of this Court to hold that a prior restraint on commercial speech must be narrow and reasonably related to a state interest, even if past speech was found to be misleading or deceptive. For instance, in *Beneficial Corp.*, where Beneficial offered advances on anticipated tax re-

funds and advertised the advances as "instant tax refunds," the Third Circuit agreed with the Federal Trade Commission that Beneficial's solicitation was misleading. 542 F.2d at 617. Nevertheless, the court went on to state that "a remedy, even for deceptive advertising, can go no further than is necessary for the elimination of the deception," *id.* at 620, and it found the injunction imposed by the FTC in this case to have been broader than necessary. The FTC had prohibited Beneficial from using certain words, which the Third Circuit, in reversing that injunction, found could be used in ways that would not be misleading. *Id.* at 619. See also *Standard Oil Co.* v. *FTC*, 577 F.2d 653, 659, 662 (9th Cir. 1978) (agreeing with FTC that past speech was misleading, but going on to find that FTC orders went "far beyond elimination of the specific misrepresentations which were made"); *National Comm'n on Egg Nutrition* v. *FTC*, 570 F.2d 157, 161, 164 (7th Cir. 1977) (holding FTC finding of misleading commercial speech supported by substantial evidence, but going on to find FTC order broader than necessary to prevent deception), *cert. denied*, 439 U.S. 821 (1978); *Commonwealth of Pa.* v. *Watson & Hughey Co.*, 563 A.2d 1276, 1280 (Pa. Commw. Ct. 1989) (injunction against future solicitation based upon alleged past violations "is unconstitutional as an impermissible prior restraint"); *State ex rel. Corbin* v. *Tolleson*, 773 P.2d 490, 501 (Ariz. Ct. App. 1989) (court cannot rely on "Tolleson's fraudulent past activity to justify restraining his future speech").

Contrary to the trend of this Court's cases, and contrary to the analysis in the other above-cited lower court cases, the Supreme Court of Appeals of West Virginia in this case ended its analysis of the lower court's injunction upon finding that petitioner's past solicitations were "misleading and deceptive." App. 31a. The Court stated that it need go "no farther in [its] analysis since upon the finding of deceptive solicitation there is nothing within the communications between [petitioner] and the targeted

West Virginia consumer which is protected under the First Amendment." App. 31a. However, the preliminary injunction that the West Virginia Court was reviewing does not simply direct petitioner to desist from commercial solicitations to the extent that past solicitations may have violated West Virginia's Prizes and Gifts Act. Rather, the injunction imposes new restrictions on future solicitations that go beyond the scope of the Act. It imposes a subjective requirement that anything petitioner denominates a "gift" or "prize" have inherently "meaningful use," such that the recipient need not spend any money to make meaningful use of it. App. 45a. It restricts the manner in which petitioner may communicate that customers have won something of value, even when they truly have won something of value. App. 46a. And, it prohibits petitioner from telling recipients of a mass mailing that they have been "specially selected," even when these persons have been hand picked based on a common characteristic. App. 46a.

Had the Supreme Court of Appeals of West Virginia reviewed the substance of the preliminary injunction under the *Central Hudson* test, it would have been compelled to find the injunction more expansive than necessary to serve any conceivable interest of the State. Instead, the Court's finding that petitioner's past communications may have been misleading became a shield from further review of the restraints on future communications imposed by the Circuit Court of Kanawha County.

To the extent that a prior restraint of speech directs the speaker to do more than simply desist from making communications found to be actually or inherently misleading it is, by definition, targeted at communications that would be potentially misleading. As discussed above, this Court requires that regulation of potentially misleading speech satisfy the *Central Hudson* test. Therefore, because the approach of the West Virginia Court in this case permits a finding of past deception to shield an in-

junction on potentially misleading future communications from reasonableness review, it is contrary to this Court's precedents.

In failing to review the preliminary injunction against petitioner for a reasonable fit with the State's asserted interest, the court below misapplied this Court's *Central Hudson* test. That error warrants review by this Court to make clear that an injunction against future speech still must satisfy the entire *Central Hudson* test, even if past speech is found to be potentially misleading.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be granted.

Respectfully submitted,

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September 19, 1996

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APPENDICES

APPENDIX A

IN THE SUPREME COURT OF APPEALS
OF WEST VIRGINIA

September 1995 Term

No. 22809

STATE OF WEST VIRGINIA, BY AND THROUGH
DARRELL V. MCGRAW, JR., ATTORNEY GENERAL,
Plaintiff Below, Appellee

v.

IMPERIAL MARKETING, *et al.*,
Defendants Below

SUAREZ CORPORATION INDUSTRIES,
Defendant Below, Appellant

Appeal from the Circuit Court of Kanawha County
Honorable Herman G. Canady, Jr., Judge
Civil Action No. 94-C-243

AFFIRMED, AS MODIFIED

Submitted: September 20, 1995

Filed: March 20, 1996

JUSTICE RECHT delivered the Opinion of the Court.

RETIRED JUSTICE MILLER, sitting by temporary assignment.

JUSTICE Albright did not participate.

SYLLABUS BY THE COURT

1. In reviewing the exceptions of the findings of fact and conclusions of law supporting the granting of a temporary or preliminary injunction, we will apply a three-pronged deferential standard of review. We review the final order granting the temporary injunction and the ultimate disposition under an abuse of discretion standard, *West v. National Mines Corp.*, 168 W. Va. 578, 590, 285 S.E.2d 670, 678 (1981), we review the circuit court's underlying factual findings under a clearly erroneous standard, and we review questions of law de novo. Syllabus Point 4, *Burgess v. Porterfield*, —— W. Va. ——, —— S.E.2d —— (No. 22956 Mar. 11, 1996).

2. The method of analysis which governs the propriety and scope of an injunction under W. Va. Code 46A-7-110 (1974) deviates from the customary standard for the issuance of temporary relief and may best be described as whether the Attorney General has shown by the existence of some credible evidence, even if disputed, that reasonable cause exists to believe that the respondent is engaging in or is likely to engage in conduct sought to be restrained. The Attorney General need not prove the respondent has in fact violated the Prizes and Gifts Act, W. Va. Code 46A-6D-1 to -10 (1992), but only needs to make a minimal evidentiary showing of good reason to believe that the essential elements of a violation of the Prizes and Gifts are in view.

3. The West Virginia Prizes and Gifts Act, W. Va. Code 46A-6D-1 to -10 (1992), was designed by the West Virginia Legislature to assist in protecting West Virginia citizens from being victimized by misleading and deceptive practices when a seller is attempting to market a product using a prize or gift as an inducement.

4. Findings of "material misrepresentation" or "actually misleading" are not necessary predicates to support a temporary injunction under the West Virginia Consumer Credit Act, W. Va. Code 46A-7-110 (1974).

5. A misrepresentation of any fact, so long as it materially induces a purchaser's decision to buy, is a deceptive practice under the West Virginia Prizes and Gifts Act, W. Va. Code 46A-6D-1 to -10 (1992).

6. Reliance on the interpretation of federal consumer protection legislation by federal courts are permissible guidelines under the West Virginia Consumer Credit and Protection Act, W. Va. Code 46A-6-101(1) (1974).

7. Under the West Virginia Prizes and Gifts Act, W. Va. Code 46A-6D-1 to -10 (1992), once the circuit court makes a finding that deceptive practices are used to affect a consumer's decision to purchase a product, then the circuit court is authorized, within the bounds of reason, to infer that the deception will constitute a material factor in a consumer's decision to purchase the product.

8. The West Virginia Legislature, under the West Virginia Consumer Credit Act, W. Va. Code 46A-7-110 (1974), is accorded considerable deference in restricting and regulating solicitations which are or may be deceptive or misleading, even to the extent of permitting prior restraints upon the deceptive solicitation.

Recht, Justice:

The defendant below and appellant herein, Suarez Corporation Industries (hereinafter "SCI"), appeals an order of the Circuit Court of Kanawha County granting a preliminary injunction restricting the method and manner by which SCI may solicit consumers in West Virginia in the sale of jewelry and other products either manufactured or distributed by SCI. In reaching its decision, the circuit court found that there was reasonable cause to believe that SCI was engaging in or is likely to engage in conduct in violation of specific provisions of the West Virginia "Prizes and Gifts Act," W. Va. Code 46A-6D-1 to -10 (1992), and accordingly granted the preliminary relief prohibiting specified conduct found to be in violation of the Act. We affirm this ruling, with a modification limiting the duration of the temporary injunction.

I.

PROCEDURAL HISTORY

The genesis of this injunction proceeding was a complaint filed by the Attorney General of West Virginia alleging violations of unlawful acts and practices under the West Virginia Consumer Credit and Protection Act, W. Va. Code 46A-6-104 (1974) and the West Virginia Prizes and Gifts Act, W. Va. Code 46A-6D-1 to -10 (1992), which is fully contained within the Consumer Credit and Protection Act, against four companies whose common business practice included the sale of consumer products through direct mail solicitations. SCI was not one of those named in the original civil action. Following additional investigation, however, the number of defendants in the original civil action was expanded to include SCI.[1]

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[1] The amended pleading included an additional 102 defendants, including SCI. For reasons not appearing in the record, the Attorney General chose to proceed exclusively against SCI, asserting that the methods used by SCI were a model for all of the defend-

SCI is an Ohio corporation [2] engaged in the business of selling consumer goods, such as simulated jewelry, by use of direct mailing. This direct mailing often takes the form of a "sweepstakes promotion," a device that informs potential consumers that they are eligible or "tied" to win a prize, often in the form of cash up to $1,000, or an automobile. This marketing scheme is designed to ultimately sell a product through the consumer's expectation of winning a valuable prize.

The factual underpinnings alleged by the Attorney General to support the request for injunctive relief concerned the deceptive and misleading methods utilized by SCI to sell various products. The central theme of the alleged deceptive and misleading practices used by SCI was to sell a product by convincing West Virginia consumers that they had won a prize or gift when, in reality, the award of the prize or gift was an illusion and nothing more than an elaborate ruse to sell SCI's product. This method of selling a product was alleged to have violated various provisions of the West Virginia Prizes and Gifts Acts (hereinafter the "Act"), including: misrepresentation of having won a prize in violation of W. Va. Code 46A-6D-3 (1992); misrepresentation of eligibility to win or receive a prize in violation of W. Va. Code 46A-6D-4 (1992); misrepresentation of being a specially selected person in connection with the sale of a product in violation of W. Va. Code 46A-6D-5 (1992); and the improper use of simulated checks in connection with a sale

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ants. We make no comment relating to any aspect of whether this matter is appropriate for a defendant's class action under W. Va. R. Civ. P. 23(a). *See generally* 1 Herbert B. Newberg & Alba Conte, *Newberg on Class Actions* § 4.45 (3rd ed. 1992).

[2] Suarez Corporation Industries does business using a number of different names including: Lindenwold Fine Jewelers; Earnest and Alexander Holding Associates; Case Waterman and Associates (with headquarters in the Edgar Price Professional Building); and DeVoorst (international purveyors of fine diamonds and gemstones).

of a product in violation of W. Va. Code 46A-6D-6 (1992).

The legal foundation for the temporary injunction was the exercise of the Attorney General's power to enforce the provisions of the Consumer Credit and Protection Act and, specifically, the power to temporarily enjoin any violation of the Act or any fraudulent or unconscionable conduct as contemplated within the West Virginia Consumer Credit and Protection Act, all as recited in W. Va. Code 46A-7-110 (1974).[3]

The Circuit Court of Kanawha County conducted two separate hearings relating to the requests for temporary relief. The first hearing resulted in the granting of a temporary injunction on September 9, 1994. The second hearing resulted in a modification of that initial order, emerging from a motion filed by SCI to dissolve the initial injunction. It is this order, entered on November 3, 1994, which granted temporary injunctive relief, from which SCI appeals.[4]

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[3] W. Va. Code 46A-7-110 (1974) provides as follows:

> With respect to an action brought to enjoin violations of this chapter or unconscionable agreements or fraudulent or unconscionable conduct, the attorney general may apply to the court for appropriate temporary relief against a respondent, pending final determination of the proceedings. If the court finds after a hearing held upon notice to the respondent that there is reasonable cause to believe that the respondent is engaging in or is likely to engage in conduct sought to be restrained, it may grant any temporary relief or restraining order it deems appropriate.

[4] The core provisions of the temporary injunction prevent SCI from engaging in any consumer solicitation utilizing the following practices:

> 1. Soliciting consumers in West Virginia with an offer which denominates an item as a prize, gift, award, premium, or similar term that implies the item is free whether stated or represented in any way, when the intended recipient is

SCI mounts a global challenge to the temporary injunction in terms of every finding of fact, conclusion of law, and ultimately the order granting temporary relief, upon a variety of grounds including:

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required to spend any sum of money to make meaningful use of it;

2. Representing to consumers in West Virginia that the prize, gift, award, premium or similarly denominated item or any good or service offered to consumers has a value in excess of the fair market value at which substantial sales of the item are made in the area where the item is being offered;
3. Representing to consumers that they have specific odds or chances of winning a prize, contest, sweepstakes, or similar promotion, unless the specific odds or chance of winning has been numerically determined and can be substantiated prior to transmittal of the solicitation;
4. Sending to potential customers in West Virginia solicitations which use language such as "you have won," "declaration of a cash prize," "you are entitled . . .," "certified winner," and making representations to solicited persons in West Virginia of having won a prize, gift or other item of value, unless the solicited person is in fact given the prize, gift or item of value, without obligation, and unless there is conformity with the conditions contained in W. Va. Code 46A-6D-3 (1992);
5. Sending solicitations to persons in West Virginia which use official sounding language and seals such as: judge's seal, office of the treasurer, claim processing division, that may lead a reasonable person to believe they have won anything of value, or sending solicitations that represent that the recipient has been specifically selected when in fact that solicitation is part of a mass mailing;
6. Sending materials to persons in West Virginia which include writings that simulate a check or resemble a check or invoice in violation of W. Va. Code 46A-6D-6 (1992);
7. Sending solicitations to persons in West Virginia containing material referencing fake jewelry ratings or prize appraisals, bogus jewelers or agents who are holding prizes for the benefit of solicited customers in West Virginia;
8. Conducting any business in the State of West Virginia in violation of W. Va. Code 46A-6D-3 (1992), the Prizes and Gifts Act.

(1) No phase of SCI's sales scheme violates the Act;

(2) The method by which SCI sells its product in West Virginia is not "unconscionable conduct" within the meaning of W. Va. Code 46A-7-110 (1974);[5]

(3) The method and manner by which SCI communicates with potential West Virginia consumers is protected "commercial speech" under the First Amendment to the United States Constitution and Article III, Section 7 of the West Virginia Constitution, and therefore cannot be prohibited;

(4) The Act, as applied, violates the Commerce Clause of the United States Constitution (Article I, Section 8) by application of the doctrine of the "dormant" or "negative" Commerce Clause which, by negative implication, limits a State's right to interfere with interstate commerce.

In order to better understand SCI's challenge to the temporary injunction, we need to scrutinize with some particularity the various methods used by SCI to sell its products in West Virginia. The Suarez sales scheme is an ingenious blueprint to persuade a potential consumer to purchase an article of jewlry or personal accessory of questionable value by creating the elaborate illusion that by purchasing the product the consumer not only acquires a valuable possession, but also joins a select group of people eligible to win a great deal of money.

II.

STANDARD OF REVIEW

As is our custom, we begin any appellate analysis by first establishing the appropriate standard of review. In reviewing the exceptions to the findings of fact and conclusions of law supporting the granting of a temporary

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[5] *See supra* note 3, for the text of W. Va. Code 46A-7-110 (1974).

or preliminary injunction, we will apply a three-pronged deferential standard of review. We review the final order granting the temporary injunction and the ultimate disposition under an abuse of discretion standard, *West v. National Mines Corp.*, 168 W. Va. 578, 590, 285 S.E.2d 670, 678 (1981), we review the circuit court's underlying factual findings under a clearly erroneous standard,[6] and we review questions of law de novo. Syllabus Point 4, *Burgess v. Porterfield*, —— W. Va. ——, —— S.E.2d —— (No. 22956 Mar. 11, 1996).

There is another more pointed justification for our deferential standard of review of the circuit's granting of temporary relief within the provisions of W. Va. Code 46A-7-110 (1974). When applying W. Va. Code 46A-7-110(1974), the circuit court is not required to adjudicate the merits as to whether there has been a violation of the Act pending a final determination of the proceedings.[7] To the contrary, the court's role at this stage

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[6] We have recently defined "clearly erroneous" as follows:

> A finding is "clearly erroneous" when, although there is evidence to support the finding, the reviewing court on the entire evidence is left with the definite and firm conviction that a mistake has been committed. However, a reviewing court may not overturn a finding simply because it would have decided the case differently, and it must affirm a finding if the circuit court's account of the evidence is plausible in light of the record viewed in its entirety.

Syllabus Point 1, in part, *In the Interest of: Tiffany Marie S.*, —— W. Va. ——, —— S.E.2d —— (No. 23198 Mar. 20, 1996).

[7] The Attorney General is seeking additional relief beyond preliminarily enjoining SCI from engaging in violations of the Consumer Credit and Protection Act and the Prizes and Gifts Act, including: (1) a permanent injunction; (2) a disgorgement of funds illegally obtained to pay restitution to victimized West Virginia; (3) civil penalties in the amount of $5,000 for each violation of the West Virginia Consumer Credit and Protection Act; (4) costs and attorney fees; and (5) compensatory and punitive damages to be awarded after an appropriate class has been certified.

is to moderate the effects of a likely violation of the Act as detected by the Attorney General and supported by sufficient proof that reasonable cause exists to believe that the respondent is engaging in or is likely to engage in conduct sought to be restrained.

Consequently, the judicial function is to supply a stop-gap measure pending a final hearing when more permanent relief is sought. Therefore, our analysis of granting temporary relief under W. Va. Code 46A-7-110 (1974) is more narrow than the typical motion for a preliminary injunction.[8]

The method of analysis which governs the propriety and scope of an injunction under W. Va. Code 46A-7-110 (1974) deviates from the customary standard for the issuance of temporary relief and may best be described as whether the Attorney General has shown by the existence of some credible evidence, even if disputed, that reasonable cause exists to believe that the respondent is engaging in or is likely to engage in conduct sought to be restrained. In other words, the Attorney General need not prove the respondent has in fact violated the Act, but only needs to make a minimal evidentiary showing of good reason to believe that the essential elements of a violation of the Act are in view.

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[8] The customary standard applied in West Virginia for issuing a preliminary injunction is that a party seeking the temporary relief must demonstrate by a clear showing of a reasonable likelihood of the presence of irreparable harm; the absence of any other appropriate remedy at law; and the necessity of a balancing of hardship test including: "(1) the likelihood of irreparable harm to the plaintiff without the injunction; (2) the likelihood of harm to the defendant with an injunction; (3) the plaintiff's likelihood of success on the merits; and (4) the public interest." *Jefferson County Bd. of Educ. v. Jefferson County Educ. Ass'n*, 183 W. Va. 15, 24, 393 S.E.2d 653, 662 (1990) (quoting *Merrill Lynch, Pierce, Fenner & Smith, Inc. v. Bradley*, 756 F.2d 1048, 1054 (4th Cir. 1985); *Blackwelder Furniture Co. v. Seilig Mfg. Co.*, 550 F.2d 189 (4th Cir. 1977).

III.

APPLYING THE STANDARDS OF REVIEW

Applying these standards of review, we conclude that the Attorney General has satisfied the burden of offering both credible anecdotal and documentary evidence sufficient to suport good reasons to believe that the essential elements of a violation of the Act are in view to the extent that reasonable cause exists to believe that SCI is engaging in, or is likely to engage in conduct which is sought to be restrained.

We begin our analysis by describing the means by which SCI sells their wares.

THE SALE OF A CUBIC ZIRCONIUM STONE

Typical of the type of product sold by SCI is a CZ Diamond, encased in a ring, pendant, or earring mounting. The plan used to sell this product is to notify potential consumers that they have won a prize, identified as an *unmounted* 1-carat Lindenwold CZ diamond simulant,[9] and that they are eligible to win a larger prize of $10,000.

The artifice of teasing potential consumers with the free gift is that the CZ diamond is basically worthless unless the stone is mounted for $19. This is how it works:

In order to persuade consumers not to accept just the *unmounted* CZ diamond, the text of the solicitation is directed toward telling consumers that the opportunity for winning the $10,000 is enhanced by purchasing the mounting.[10] The device used to carry out this inducement

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[9] A 1-carat CZ diamond is a nonprecious stone made of cubic zirconium that, according to SCI, has a value of "up to" $80. SCI includes with many of its solicitations an appraisal and certificate of authenticity on its cubic zirconium stones.

[10] SCI informs consumers that the stone has already been mounted, and according to the rules of the contest, SCI can award only the stone, not the mounting.

is to place a variety of obstacles in the path of claiming just the *unmounted* stone. In the event that consumers jump through the hoops of claiming simply the prize of an *unmounted* stone,[11] they are then sent a follow-up solicitation designed to persuade them to return the *unmounted* stone and purchase a mounting, the text of which informs them that if they do not purchase the mounting, their file will be closed, thereby creating the impression that unless consumers purchase the mounting, they will lose the opportunity of being awarded the $10,000 grand prize.

This method of selling a mounted cubic zirconium stone for $19 establishes reasonable cause to believe that SCI is engaging in or likely to engage in conduct which may violate the following provisions of the Prizes and Gifts Act:

(1) that part of the Act which proscribes obligating a consumer in order to receive the gift or prize[12] (W. Va. Code 46A-6D-3(a)(1) (1992));[13]

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[11] In order to claim the prize of the *unmounted* cubic zirconium stone, consumers must affix a label from one form on to another form, then handwrite a "code number" on the new form, then fill out a release form, and then mail it in a #10 white envelope, which must be provided by the consumers. The failure to properly comply with this series of demands results in disqualification, both in terms of the *unmounted* stone and eligibility of the $10,000 grand prize. This cumbersome process is contrasted with the simplified method of purchasing the mounted stone, which only requires consumers to complete a simple order form and return it to SCI in a self-addressed envelope. Once a consumer completes the simplified order form to purchase the mounted stone and returns the form within the prescribed time period, there is no risk of being disqualified from winning the grand prize.

[12] The evidence introduced at the preliminary stages of this case supports the finding that consumers are obligated to spend $19 in order to make meaningful use of the gift.

[13] W. Va. Code 46A-6D-3(a)(1) (1992) provides:

> (a) Unless otherwise provided by article six of this chapter, a person may not, in connection with the sale or lease or

(2) that part of the Act which requires delivery of a gift at no expense to the recipient and within ten days of the representation [14] (W. Va. Code 46A-60-3(a)(2) (1992)); [15]

(3) that part of the Act which requires the disclosure of the true retail value of the prize [16] (W. Va. Code 46A-6D-4(a)(1)(i), (a)(2)(i) (1992)); [17]

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solicitation for the sale or lease of goods, property or service, represent that another person has won anything of value or is the winner of a contest, unless all of the following conditions are met:

(1) The recipient of the prize, gift or item of value is given the prize, gift or item of value without obligation. . . .

[14] The consumers are warned that since the stone is already mounted, it will take a longer period of time—up to sixty days—to receive the gift of an *unmounted* stone.

[15] W. Va. Code 46A-6D-3(a)(2) (1992) provides:

(a) Unless otherwise provided by article six [§ 46A-6-101 et seq.] of this chapter, a person may not, in connection with the sale or lease or solicitation for the sale or lease of goods, property or service, represent that another person has won anything of value or is the winner of a contest, unless all of the following conditions are met:

* * * *

(2) The prize, gift or item of value is delivered to the recipient at no expense to him or her, within ten days of the representation.

[16] The retail value of the prize being "up to" $80 does not represent a clear and meaningful disclosure. The ambiguity as to the value of the prize is compounded when SCI uses appraisals and jeweler's reports similar to those used for real diamonds, when the prize is nothing more than an ersatz diamond.

[17] W. Va. Code 46A-6D-4(a)(1)(i), (a)(2)(i) (1992) provides:

(a) A person may not represent that another person is eligible or has a chance to win or to receive a prize, gift or item of value without clearly and conspicuously disclosing on whose behalf the contest or promotion is conducted, as well as all material conditions which a participant must satisfy. In an oral solicitation all material conditions shall be disclosed

(4) that part of the Act which requires the disclosure of the odds of winning the prize [18] (W. Va. Code 46A-6D-4(a)(1)(ii)-(iii), (a)(2)(ii)-(iii), (b)(2)(1992); [19] and

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prior to requesting the consumer to enter into the sale or lease. Additionally, in any written material covered by this section, each of the following shall be clearly and prominently disclosed:

(1) Immediately adjacent to the first identification of the prize, gift or item or value to which it relates; *or*

(2) In a separate section entitled "Consumer Disclosure" which title shall be printed in no less than ten-point bold-face type and which section shall contain only a description of the prize, gift or item of value and the disclosures outlined in paragraphs (i), (ii) and (iii) of this subdivision:

(i) The true retail value of each item or prize. . . .

(Emphasis added.) (Note: Because of the structure of the statute, subparts i, ii and iii listed under subpart (2) also apply to subpart (1).)

[18] The text of the solicitations contained inconsistent information as to the odds or chances of winning. Some state that "[t]he chances of winning any prize depend upon the number of entries actually received," others are silent as to the odds of winning; both of which fail to make a clear and meaningful disclosure of the odds of winning a prize as required by the Act.

[19] W. Va. Code 46A-6D-4(a)(1)(ii)-(iii), (a)(2)(ii)-(iii), (b)(2) (1992) provides:

(a) A person may not represent that another person is eligible or has a chance to win or to receive a prize, gift or item of value without clearly and conspicuously disclosing on whose behalf the contest or promotion is conducted, as well as all material conditions which a participant must satisfy. In an oral solicitation all material conditions shall be disclosed prior to requesting the consumer to enter into the sale or lease. Additionlly, in any written material covered by this section, each of the following shall be clearly and prominently disclosed:

(1) Immediately adjacent to the first identification of the prize, gift or item of value to which it relates; or

(2) In a separate section entitled "Consumer Disclosure" which title shall be printed in no less than ten-point bold-face type and which section shall contain only a description of the

(5) that part of the Act which proscribes using language that would lead reasonable persons to believe that they had been specially selected when that particular solicitation is part of a mass mailing[20] (W. Va. Code 46A-6D-5 (1992)).[21]

THE SALE OF A CLUTCH PURSE ENSEMBLE

In this solicitation, SCI is selling a five-piece clutch purse ensemble. The inducement used to sell this product is to notify potential consumers that they have won a cash prize of "as much as" $1,000.

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prize, gift or item of value and the disclosures outlined in paragraphs (i), (ii) and (iii) of this subdivision:

* * * *

(ii) The actual number of each item, gift or prize to be awarded; and

(iii) The odds of receiving each item, gift or prize.

(b) All disclosures required by this article to be in writing shall comply with the following:

* * * *

(2) The number of each item, gift or prize to be awarded and the odds of receiving each item, gift or prize shall be stated in arabic numerals and shall be written in a manner which is clear and understandable.

[20] In some of the solicitations, SCI informs consumers that they have qualified among *only* 9% of the entire population of the United States.

[21] W. Va. Code 46A-6D-5 (1992) provides:

(a) A person may not represent that another person has been specially selected in connection with the sale or lease or solicitation for sale or lease of goods, property or service, unless the selection process is designed to reach a particular type or types of persons.

(b) The use of any language that may lead a reasonable person to believe he has been specially selected, including, but not limited to, "Carefully Selected", or "You have been selected to receive", or "You have been chosen", is a representation of the type governed by this section.

The consumers are told that their cash prize has been placed in one of the five clutch purses, all of which may be purchased for a price of $12 plus $2 for shipping and handling.

While the consumers are told that they need not purchase the clutch purse ensemble to claim their cash prize, SCI presents its solitiation in such a manner as to give consumers the impression that they will be given special preference if they purchase the purse ensemble.[22] As in the sale of the mounted cubic zirconium stone, SCI places numerous obstacles in the path of those consumers who wish to claim their prize without purchasing SCI's product,[23] and requires consumers to respond within ten days or forfeit their prize.

This method of selling a five-piece clutch purse ensemble for $12 plus $2 shipping and handling establishes reasonable cause to believe that SCI is engaging in or likely to engage in conduct which may violate the following provisions of the Prizes and Gifts Act:

(1) that part of the Act which requires delivery of a gift at no expense to the recipient and within ten days

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[22] Consumers are informed that because SCI will have to remove the check from the purses of those not ordering, those who purchase the purse ensemble will receive priority handling.

[23] To claim their cash prize without purchasing the clutch purse ensemble, consumers must cut out the prize confirmation bar code from the order form and paste it onto a 3½" x 5½" index card, which the consumer must furnish; then write their name, address, and phone number on the card; and then mail it in a #10 white envelope, which also must be provided by the consumers. The failure to properly comply with this series of demands results in a forfeiture of the cash prize. This cumbersome process is contrasted with the simplified method of purchasing the purse ensemble, which only requires consumers to complete a simple order form and return it to SCI in a self-addressed envelope. Once a consumer completes the simplified order form to purchase the purses and returns the form within the prescribed time period, there is no risk of being disqualified from winning the cash prize.

of the representation [24] (W. Va. Code 46A-6D-3(a)(2) (1992));[25]

(2) that part of the Act which requires the disclosure of the true retail value of the prize [26] (W. Va. Code 46A-6D-4(a)(1)(i), (a)(2)(i) (1992)).[27]

THE SALE OF CANDLESTICK HOLDERS

It is SCI's goal in this solicitation to sell a product described as a pair of 24% heavy lead crystal candlestick holders. The purchase price of this product is $19. As an inducement to purchase the candlestick holders, SCI offers consumers a bonus of a glass heart-shaped dish at no additional cost. The candlestick holder purchasers are also eligible to win a $1,000 cash prize. The consumers are told that they do not need to purchase the candlestick holders to remain eligible for the $1,000 prize.

Superficially, it would appear that this method of selling a product is rather benign and an acceptable business practice. However well intended SCI may have acted in this method of selling a product, this marketing technique would also likely fail under the Act's scrutiny.

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[24] SCI informs consumers that they should allow forty-seven days from the time they receive the solicitation to the time they receive their cash prize. This time lapse of forty-seven days is a violation of W. Va. Code 46A-6D-3(a)(2) (1992), which requires that a prize be delivered within ten days of the representation that a consumer has won a prize.

[25] *See supra* note 15, for the text of W. Va. Code 46A-6D-3(a)(2) (1992).

[26] Merely representing that one has won up to $1,000 is not a clear and meaningful disclosure as to the true amount of the prize won, and can mean as little as $1. Indeed, over 99.5% of the prize-winners win a $1 prize.

[27] *See supra* note 17, for the text of W. Va. Code 46A-6D-4(a)(1)(i), (a)(2)(i) (1992).

In order to entice consumers into purchasing the candlestick holders, SCI presents the text of the solicitation in such a way that would lead consumers to believe that their opportunity for winning the $1,000 cash prize improves if they purchase the candlestick holders. As with the mounted cubic zirconium stone and clutch purse schemes, SCI places numerous obstacles in the path of those who do not want to order the candlestick holders but wish to remain eligible for the $1,000 cash prize,[28] and consumers are told that those who do not order will receive priority handling and immediate security processing. As further enticement, SCI offers consumers a simulated check, which can only be used to cover the price of shipping and handling of the bonus glass heart-shaped dish, which can only be acquired by purchasing the candlestick holders.

This method of selling candlestick holders for $19 establishes reasonable cause to believe that SCI is engaged in or likely to engage in conduct which may violate the following provisions of the Prizes and Gifts Act:

(1) that part of the Act which requires the true retail value of the prize or gift [29] (W. Va. Code 46A-6D-4(a)(1)(i), (a)(2)(i) (1992)); [30] and

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[28] If consumers do not wish to order the candlestick holders, they must print their name, address, and customer number onto a 3½" x 5½" index card and enclose it, along with the envelope provided for those who choose to purchase (presumably, envelopes with a certain code and of a certain color indicate those who have won), in a second envelope, which the consumers must provide. Consumers are given ten days from the date of receipt to respond.

[29] No retail value is given for the bonus of the glass heart-shaped dish. SCI simply states it is "sure that the [matching heart-shaped dish] must be worth over $15." This disclosure does not provide consumers a clear and meaningful representation as to the true retail value of the bonus.

[30] *See supra* note 17, for the text of W. Va. Code 46A-6D-4(a)(1)(i), (a)(2)(i) (1992).

(2) that part of the Act which proscribes the use of a simulated check without conspicuously disclosing its true value and purpose[31] (W. Va. Code 46A-6D-6(a) (1992)).[32]

While the product and technique used in each of the various solicitations may vary, there is a commonality that pervades every one of SCI's marketing schemes: SCI induces consumers to purchase its products through misleading statements, thereby creating in the minds of the consumers a false expectation that if they purchase the product, they will enhance their chances of winning a prize of significantly greater value than the product being sold, and if they do not purchase the product and merely accept the worthless gift, their chances of winning the substantial prize are greatly reduced. SCI's sweepstakes are nothing more than ingeniously crafted deceptive methods to sell its merchandise by deluding consumers with expectations of greater rewards if they purchase the product that is the subject of the solicitation.[33]

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[31] This simulated check does not contain any conspicuous language to inform the consumer that it is a non-negotiable instrument. The only evidence to indicate that this "check" cannot be presented to a bank is that the order form to which it is attached states that the "check" is not to be removed, but is to accompany the form when purchasing the candlestick holders, in order to absorb the shipping and handling costs for the bonus heart-shaped dish.

[32] W. Va. Code 46A-6D-6(a) (1992) provides:

> In connection with a consumer transaction, no person may issue any writing which simulates or resembles:
>
> (a) A check unless the writing clearly and conspicuously disclosed its true value and purpose, and the writing would not mislead a reasonable person. . . .

[33] While the record may not be as clear as the evidence relating to the sale of the mounted cubic zirconium stone, clutch purse ensembles, and candlestick holders, we would be remiss if we did not make mention of SCI's solicitation in which it represents to consumers that they have won a prize, and then makes use of a 900 telephone number as a means to entice a person into investing

IV.

SCI'S CHALLENGE TO TEMPORARY INJUNCTION

We earlier placed each of the reasons why SCI contends that the preliminary injunction granted by the circuit court should be dissolved upon this appeal into four categories.[34] However, two categories can be discussed together as they concern whether there was sufficient evidence to support the conclusions from which flowed the temporary injunction that: (1) the Act was violated; and (2) SCI's conduct was unconscionable within the meaning of the West Virginia Consumer Credit and Protection Act and specifically, W. Va. Code 46A-7-110 (1974). We will discuss the evidentiary objections under a singular rubric and each of the two remaining categories, including the First Amendment and dormant Commerce Clause challenges, will be discussed separately.

A. *Sufficiency of Evidence to Support Temporary Injunction Restraining Violations of the West Virginia Consumer Credit Protection Act and the Prizes and Gifts Act*

We have described—with possibly more detail than necessary—how and why the methods by which SCI attempts to sell its products to West Virginia consumers demonstrate reasonable cause to believe that SCI is either engaging in or is likely to engage in conduct in violation

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up to $8 to claim a prize, since to do so would expedite the receipt of that prize. This scheme requires consumers to expend money in order to receive the prize within ten days, a violation of W. Va. Code 46A-6D-3(a)(2) (1992). *See supra* note 15, for the text of W. Va. Code 46A-6D-3(a)(2) (1992). The record reveals that SCI has refunded the cost of the telephone call when challenged by the Attorney General's office. We doubt that SCI would be so beneficient if it did not share the profits of the telephone call.

[34] *See supra* part I.

of the Act, and should be restrained in the manner shaped by the terms of the temporary injunction.[35]

The West Virginia Prizes and Gifts Act was designed by the West Virginia Legislature to assist in protecting West Virginia citizens from being victimized by misleading and deceptive practices when a seller is attempting to market a product using a prize or gift as an inducement.

The record, which has been developed during the two hearings upon the preliminary injunction and placed before this Court, supports the circuit court's account of the evidence as being plausible when the record is viewed in its entirety. Accordingly, the finding that SCI is engaged in misleading and deceptive practices as enumerated in the temporary injunction order is not clearly erroneous. *See* note 6 for Syllabus Point 1, in part, *In the Interest of: Tiffany Marie S.*, —— W.Va. ——, —— S.E.2d —— (No. 23198 Mar. 20, 1996). SCI asserts that the findings of fact are flawed in that there was not a specific finding that any of the solicitations amounted to material misrepresentations. SCI maintains that when viewing the solicitations in their totality, they contain nothing more than standard puffing and hyberbole that is an acceptable and lawful practice when attempting to sell a product.

The circuit court found, however, and we agree that:

(1) SCI has used official sounding language in violation of W. Va. Code 46A-6D-5 (1992) to misrepresent special selection when, in fact, such letters go to thousands of consumers;

(2) That SCI's mailings deceive recipients as to the value of the prize or the item ordered; and

(3) That consumers mistakenly believe they are obtaining a bargain when, in fact, the fee or charge is often more than the prize and the purchased item are worth combined.

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[35] *See supra* part III.

While admittedly these findings do not use the words "material misrepresentation" or "actually misleading," such findings are not a necessary predicate to support a temporary injunction under W. Va. Code 46A-7-110 (1974).

It is clear from this record that SCI's solicitations induce a consumer to purchase a product, not necessarily with direct misrepresentations about a product,[36] but with other misleading and deceptive practices which affect the consumer's decision to buy. The misrepresentation of any fact, so long as it materially induces a purchasers' decision to buy, is a deceptive practice under the West Virginia Prizes and Gifts Act. This was the same conclusion reached by the United States Supreme Court in *FTC v. Colgate-Palmolive Co.*, 380 U.S. 374, 387 (1965), when the Court was analyzing deceptive trade practices under section 5 of the Federal Trade Commission Act, 15 U.S.C. § 45(a)(1).[37] Reliance on the interpretation of federal consumer protection legislation by federal courts are permissible guidelines under the West Virginia Consumer Credit and Protection Act. *See* W. Va. Code 46A-6-010(1) (1974).

We hold that under the West Virginia Prizes and Gifts Act, once the circuit court makes a finding that deceptive practices are used to affect a consumer's decision to purchase a product, then the circuit court is authorized, within the bounds of reason, to infer that the deception will constitute a material factor in a consumer's decision to purchase the product. *See FTC v. Colgate-Palmolive Co.*, 380 U.S. 374, 392 (1965); *Zauderer v. Office of*

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[36] However, we are reminded in the cubic zirconium stone solicitation that SCI goes to great efforts to compare the value of its stone with a genuine mined diamond worth several thousand dollars, including appraisals and certificates of authenticity on SCI's ersatz diamonds. *See supra* notes 9, 16.

[37] 15 U.S.C. § 45(a)(1) (1958 ed.) provided:

> Unfair methods of competition in commerce, and unfair or deceptive acts or practices in commerce, are declared unlawful.

Disciplinary Control, 471 U.S. 626, 652-53 (1985) (where the possibility of deception is self-evident, extrinsic evidence is not necessary for a finding that materials are misleading).

We next address whether SCI, as a result of its solicitations, has engaged in unconscionable conduct. The circuit court, in denying SCI's motion to dissolve the temporary injunction, concluded that SCI's solicitations constituted unconscionable conduct.[38]

SCI argues that mail solicitations do not place the same amount of pressure as would accompany a personal solicitation, thereby lacking the requisite level of overreaching necessary to constitute unconscionability. We agree that mail solicitations generally subject the consumer to a lesser degree of coercion than face-to-face or even telephone solicitations, *see Shapero v. Kentucky Bar Ass'n,* 486 U.S. 466, 475-476 (1988) (discussing the coercive nature of solicitations in the context of a blanket prohibition on attorney solicitations which were not found to be misleading or deceptive),[39] and, therefore, should be closely scrutinized before concluding that such conduct is unconscionable. Despite this higher level of scrutiny, we believe that SCI has nonetheless engaged in unconscionable conduct through the language and technique of its mail solicitations.

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[38] The order denying SCI's motion to dissolve and modifying the preliminary injunction did not enjoin SCI from engaging in any unconscionable conduct. Insofar as we are able to determine in reviewing the record, the only reason that the circuit court concluded that SCI was engaged in unconscionable conduct, as that term is used in W. Va. Code 46A-7-110 (1974), was to strengthen its resolve in denying SCI's motion to dissolve. Accordingly, we only discuss SCI's challenge within this context.

[39] However, the United States Supreme Court also acknowledged in *Shapero* that personalized letters present an increased risk of deception and the greater likelihood of coercion. *Shapero v. Kentucky Bar Ass'n,* 486 U.S. 466, 476 (1988).

One of the principals of SCI is Benjamin D. Suarez, whose design for a successful sales campaign through mail solicitation is contained in an exhibit introduced during one of the hearings upon the motion for preliminary relief. In his book, *7 Steps to Freedom II: How to Escape the American Rat Race*, Mr. Suarez expresses a recurrent theme of assuring the sale of a product through a mail solicitation by baiting the sale with promises of prizes and rewards and warning the consumers that if they do not purchase a product and respond within a prescribed time period, they risk a forfeiture of these prizes and rewards.[40]

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[40] The following are excerpts from the book, Benjamin D. Suarez, *7 Steps to Freedom II: How to Escape the American Rat Race* (1993):

> Free Gift Offers/You Won Offers: WARNING
>
> Free Gift/You Won offers where non-buyers qualify to receive the gift can be very powerful sales tools. *But they are often difficult* to use successfully for a number of reasons:
>
> 1. *Prospects often respond by requesting the free gifts and not purchasing any product.* Copy should not accentuate responding to receive free gifts *without any obligation whatsoever.* Weave the benefits of product into your free gift offer.

Id. at 2-82 (emphasis added.)

> What do people expect to get from a "Payments and Settlements Division" of an accounting office? A check for cash, of course. That's why a check pattern and the prospect's name and address show through the envelope window. A small window on the right side shouts out the amount of $789.21. The fact that it's not an even number adds to the realism.

Id. at 2-91 to 2-92.

> A customer reply envelope is provided, so the prospect does not have a reason for delaying the return of their "Claim Form." This envelope has an urgent, businesslike appearance which compels the prospect to use it immediately. The appearance of the envelope gives prospects a secure feeling that their sweepstakes claims will be properly processed and their merchandise orders will, in fact, be fulfilled.

Id. at 2-92.

> The key to direct mail success is a presentation that is logical and consistent all the way through the package, that

In a self-fulfilling prophecy, Mr. Suarez, through his company, SCI, has made fear and confusion the catalysts to assure a completed sale of whatever product is being peddled.[41]

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talks personally, one-on-one to the prospect, and that creates a perception of importance, *making the prospect fearful or reluctant to set it aside without acting.*

* * *

The name and address showing through the window look like they are typewritten, *giving a strong impression that the mailing is highly personal.* . . .

The overall impression of official starkness *creates an element of fear* in the prospect's mind—"I can't throw this away because there may be official documents, or even money inside. I had better open it now and act on it.

Id. at 2-98 (emphasis added.)

All these elements are very subtle, yet when they are combined, they become extremely powerful—more powerful than a cute sales slogan or artsy design, because there is a high degree of believability.

* * *

You would not throw away a deed or your birth certificate, and the prospect would be very hard-pressed to feel comfortable about throwing away this letter. 2-99

* * *

Further *urgency* is created with an immediate deadline and a list of simple instructions that must be followed to claim the prize.

Id. at 2-99 (emphasis added.)

The Reply Envelope is simple, stark, and official-looking. It includes a personal, important-sounding handwritten note that creates a sense of *urgency* for the prospect.

Id. at 2-100 (emphasis added.)

[41] What comes to mind is:

Oh, what a tangled web we weave,
When first we practise to deceive!

Sir Walter Scott, *Marmion,* Poetical Works, 89, 161 (J. Logie Robertson ed., 1967).

It is the tangled web of the total SCI sales campaign that the circuit court found to be unconscionable.

While we believe that mail solicitations require greater scrutiny than perhaps that of a personal or telephone solicitation, the record which we have reviewed supports the circuit court's conclusion of SCI's unconscionable conduct based upon an examination of the solicitations scheme, as a whole, measured against what Mr. Suarez attempted to accomplish in his manual for a successful sales campaign.[42]

B. *Are SCI's Solicitations Protected Under the Commercial Speech Doctrine and Therefore Cannot be Restrained?*

SCI contends that all of its solicitations with potential West Virginia consumers are protected by the First Amendment to the United States Constitution and Article III, Section 7 of the West Virginia Constitution, and therefore cannot be restrained, and to the extent that the temporary injunction does just that, it cannot be enforced.[43]

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[42] We note that at least one other state explicitly provides that a violation of its prizes and gifts laws constitutes an unconscionable act or practice without distinguishing between written and oral solicitations. *See* Kan. Stat. Ann. § 50-692(g) (1994) ("Any violation of [the Prize Notification] section is an unconscionable act or practice under the Kansas consumer protection act.").

[43] The First Amendment to the United States Constitution and Article III, Section 7 of the West Virginia Constitution are virtually identical in pertinent parts. Both constitutional provisions prohibited the making of any law abridging the freedom of speech or of the press. For purposes of this opinion, we use the First Amendment to the United States Constitution and Article III, Section 7 of the West Virginia Constitution interchangeably. Article I, Section 1 of the West Virginia Constitution recognizes that the United States Constitution shall be the supreme law of the land. Accordingly, the decisions of the United States Supreme Court interpreting the First Amendment are binding on this Court and, consequently, will be used throughout our discussion of this issue. *See Pushinsky v. West Virginia Bd. of Law Examiners*, 164 W. Va. 736, 744, 266 S.E.2d 444, 449 (1980).

In order to fully understand SCI's position on this important constitutional consideration of the temporary injunction, we must briefly examine the evolution of the commercial speech doctrine.[44]

The protection of commercial speech [45] has an erratic history. More than fifty years ago, commercial speech was completely excluded from First Amendment protection. *Valentine v. Chrestensen*, 316 U.S. 52 (1942); *Breard v. Alexandria*, 341 U.S. 622 (1951). Several decisions which followed *Valentine* and *Breard*, including *Pittsburgh Press Co. v. Pittsburgh Comm'n on Human Relations*, 413 U.S. 376 (1973), and *Bigelow v. Virginia*, 421 U.S. 809 (1975), consider the exclusion of First Amendment protection of commercial speech of doubtful validity.[46]

In 1976, the Court in *Virginia State Bd. of Pharmacy v. Virginia Citizens Consumer Council, Inc.*, 425 U.S. 748 (1976), without expressly overruling either *Valentine* or

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[44] We need not encumber this opinion with a lengthy discussion as to whether the speech which SCI claims is constitutionally protected is "commercial" as opposed to "non-commercial" or "pure" speech. Our review of the record, combined with the absence of any serious contention by SCI to the contrary, convinces us that the speech in this case does "no more than propose a commercial transaction." *See Pittsburgh Press Co. v. Pittsburgh Comm'n on Human Relations*, 413 U.S. 376, 385 (1973). Accordingly, we apply First Amendment jurisprudence concerning commercial speech.

[45] An acceptable working definition of commercial speech is offered in *Virginia State Bd. of Pharmacey v. Virginia Citizens Consumer Council, Inc.*, 425 U.S. 748, 762 (1976), as speech which does "no more than propose a commercial transaction,' is so removed from any 'exposition of ideas,' and from ' "truth, science, morality, and arts in general, in its diffusion of liberal sentiments on the administration of Government." ' " *Id.* (citations omitted).

[46] *See Virginia State Bd. of Pharmacy v. Virginia Citizens Consumer Council, Inc.*, 425 U.S. 748, 759 & n.16 (1976) for a careful analysis of the erosion of the denial of any protection for commercial speech.

Breard, held that commercial speech did not lack First Amendment protection. The cycle of commercial speech jurisprudence was completed in 1980 with the Court's decision in *Central Hudson Gas & Elec. Corp. v. Public Serv. Comm'n*, 447 U.S. 557 (1980), in which the Court promulgated a four-part test for analyzing commercial speech cases.[47]

Application of the Central Hudson *Test*

In order to determine the text of the communications between SCI and its targeted consumers in West Virginia

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[47] There are many variaitons of the commercial speech doctrine expressed in a number of decisions by the United States Supreme Court, *e.g.*, *Ohralik v. Ohio State Bar Ass'n*, 436 U.S. 447 (1978) (recognizing that commercial speech has a limited measure of protection commensurate with its subordinate position in the scale of Fifth Amendment values); *Zauderer v. Office of Disciplinary Counsel*, 471 U.S. 626 (1985) (governments are free to prevent the dissemination of commercial speech that is false, deceptive or misleading); *Posadas de Puerto Rico Assoc. v. Tourism Co.*, 478 U.S. 328 (1986) (where the underlying interest should not be protected, *i.e.*, casino gambling, the speech relating to that activity should not be protected); *City of Cincinnati v. Discovery Network, Inc.*, 507 U.S. 410 (1993) (clarifying and reenforcing the four prong test originally announced in *Central Hudson Gas & Elec. Corp. v. Public Serv. Comm'n*, 447 U.S. 557 (1980)). Also, there are extant a number of scholarly comments and criticisms of the commercial speech doctrine and its contemporary relevance. *See* Alex Kozinski & Stuart Banner, *Who's Afraid of Commercial Speech?*, 76 Va. L. Rev. 627 (1990); David F. McGowan, Comment, *A Critical Analysis of Commercial Speech*, 78 Cal. L. Rev. 359 (1990); *The Supreme Court—Leading Cases*, 107 Harv. L. Rev. 144, 234 (1993). The cases and scholarly articles are helpful in understanding the depth of the commercial speech doctrine; however, for purposes of this opinion, the recognition of First Amendment protection to commercial speech as pronounced in *Virginia State Bd. of Pharmacy v. Virginia Citizens Consumer Council, Inc.*, 425 U.S. 748 (1976), and the four-part test for analyzing commercial speech cases as articulated in *Central Hudson Gas & Elec. Corp. v. Public Serv. Comm'n*, 447 U.S. 557 (1980), are sufficient precedents to address SCI's First Amendment concerns vis-à-vis the temporary injunction.

is entitled to any free speech protection within the meaning of the commercial speech doctrine, we are required to apply the four step analysis mandated in *Central Hudson Gas & Elec. Corp. v. Public Serv. Comm'n*, 447 U.S. 557 (1980).

What distinguishes the attack raised by SCI in this case from the typical commercial speech case, which concentrates on the governmental restriction expressed in a statute or regulation, is that SCI is not directly opposing the language or the provisions of the Prizes and Gifts Act. Instead, SCI confines its objections to the terms of the temporary injunction, which restricts its right to communicate with its customers and is therefore a violation of the First Amendment as applied to SCI. Accordingly, we will apply the *Central Hudson* four-part test to the terms of the temporary injunction to determine whether or not they improperly restrict SCI's right to sell its product through direct mail solicitation.

Prior to commencing our *Central Hudson* analysis, we cannot forget the standard of proof which we have previously established to issue a temporary injunction under W. Va. Code 46A-7-110 (1974). In order to temporarily restrain SCI's solicitation of West Virginia customers in a manner that we have described, the Attorney General must only prove by minimal evidence that the language of the solicitations brings a violation of the Prizes and Gifts Act in view.

With this standard as a guide, we apply *Central Hudson*. The four steps in *Central Hudson* to determine the constitutionality of any restriction or regulation of commercial speech are as follows:

(1) The speech must concern lawful activity and not be misleading.

(2) Whether the State has a substantial interest in restricting the speech.

(3) Does the restriction directly advance the State's interest? (and)

(4) Is there a reasonable fit between the regulation and the State's interest? [48]

Central Hudson Gas & Elec. Corp. v. Public Serv. Comm'n, 447 U.S. 557, 564 (1980).

The first step of *Central Hudson* is nothing more than an extension of the holding in *Virginia State Bd. of Pharmacy*, which extended First Amendment protection to commercial speech, but refused to extend that protection to deceptive commercial speech. *Virginia State Bd. of Pharmacy v. Virginia Citizens Consumer Council, Inc.*, 425 U.S. 748, 771 (1976) ("Obviously, much commercial speech is not probably false . . . but only deceptive or misleading. We foresee no obstacle to a State's dealing effectively with this problem.") This concept was then incorporated as step one in the *Central Hudson* test: "[f]or commercial speech to come within [First Amendment protection], it at least must concern lawful activity and not be misleading." *Central Hudson*, 447 U.S. at 566.

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[48] This fourth step has undergone some transformation since *Central Hudson* was published in 1980. In *Central Hudson*, the court indicated that a restriction which met the first three factors of the commercial speech analysis but was not the least restrictive means available should be held unconstitutional. *See Central Hudson*, 447 U.S. at 564. However, writing for the Court in *Board of Trustees v. Fox*, 492 U.S. 469 (1989), Justice Scalia indicates that the test is not as restrictive as the language appears to indicate. Rather, the test was one of a reasonable "'"fit" between the legislature's ends and the means chosen to accomplish those ends.'" *Id.* at 480 (quoting *Posadas de Puerto Rico v. Tourism Co.*, 478 U.S. 328, 341 (1986). This reasonable "fit" standard appears to be the new fourth prong of the *Central Hudson* formulation. *See* Todd J. Locher, Comment, *Board of Trustees of the State University of New York v. Fox: Cutting Back on Commercial Speech Standards*, 75 Iowa L. Rev. 1335 (1990).

As we have detailed at some length in prior portions of this opinion, we agree with the circuit court's findings that SCI's solicitations, particularly in the sale of the cubic zirconium stones, clutch purses, and crystal candlesticks were misleading and deceptive.[49] We therefore need to go no farther in our analysis since upon the finding of deceptive solicitation there is nothing within the communications between SCI and the targeted West Virginia consumer which is protected under the First Amendment.

We recognize that the effect of the temporary injunction is to impose prior restraints upon SCI's method and manner of selling its product to West Virginia consumers. Many courts have found repugnant any prior restraints on non-commercial speech, as well as certain types of commercial speech. *Organization for a Better Austin v. Keefe*, 402 U.S. 415, 419 (1971) ("Any prior restraint on expression comes to this Court with a 'heavy presumption' against its constitutional validity."); *Nebraska Press Ass'n v. Stuart*, 427 U.S. 539 (1976). However, there is not a similar reluctance to uphold a prior restraint on misleading or deceptitve speech. *See United States Postal Serv. v. Athena Products, Ltd.*, 654 F.2d 362 (5th Cir. 1981), *cert. denied*, 456 U.S. 915 (1982).

As we have stated, the West Virginia Legislature, in W. Va. Code 46A-7-110 (1974), has empowered the Attorney General to obtain a temporary injunction against any conduct which provides reasonable cause to believe that there is either a violation of the Prizes and Gifts Act or that there is likely to be a violation of the Act. We hold that the Legislature is accorded considerable deference in restricting and regulating solicitations which are or may be deceptive or misleading, even to the extent of permitting prior restraints upon the deceptive violation. W. Va. Code 46A-7-110 (1974), as applied to the facts of this case, does not trespass upon First Amendment values.

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[49] *See supra* part III.

While SCI does not specifically object to the absence of any time constraints within the injunction, we are troubled by prior restraint that may extend longer than is necessary to effect the purpose of the Act. While the State has the right in this case to restrain deceptive commercial speech under the standard of proof required for a temporary injunction under W. Va. Code 46A-7-110 (1974), the restrictions imposed within the temporary injunction should not endure longer than is necessary to bring this matter to a final conclusion. Accordingly, we shall modify the temporary injunction by limiting it to a period not to exceed one hundred eighty (180) days after the mandate of this Court is issued.

C. *Does the Temporary Injunction Violate the Dormant Commerce Clause?*

SCI argues that the Prizes and Gifts Act as applied to it under the facts of this case violates United States Constitution, Article I, Section 8.[50]

The central theme of this argument is that West Virginia, as expressed through the temporary injunction restraining SCI from specified business practices in violation of the Prizes and Gifts Act, is interfering with interstate commerce. SCI contends that West Virginia is interfering with interstate commerce in two ways. First, since no West Virginia residents were among the defendants named in the original and amended complaint, then by implication West Virginia is favoring West Virginia businesses. Second, West Virginia is enforcing the Prizes and Gifts Act in such a manner that it imposes a burden on interstate commerce that exceeds its supposed purpose. We reject both contentions.

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[50] U.S. Const., art. I, § 8 provides in pertinent part:

The Congress shall have Power . . . [t]o regulate Commerce with foreign Nations and among the several States, and with the Indian Tribes.

Nothing in the Commerce Clause of the United States Constitution expressly restricts the power of a State to regulate a subject of interstate commerce. Emerging, however, from the absence of any language explicitly limiting a State's power to interfere with interstate commerce is the doctrine linked to the Constitution's silence known as the negative or dormant Commerce Clause.[51]

The dormant Commerce Clause is a judicially framed doctrine that no State has the unlimited, unrestricted power to interfere with the flow of interstate commerce. In other words, through a series of decisions, the United States Supreme Court has developed a rule that no State may legislate that certain products may not enter through its borders. *See H.P. Hood & Sons, Inc. v. Du Mond*, 336 U.S. 525 (1949); *City of Philadelphia v. New Jersey*, 437 U.S. 617 (1978). While the doctrine expressed as the dormant Commerce Clause has been sharply criticized both in case and scholarly comment, it survives to the extent we must respond to its application to the facts of this case.[52]

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[51] This doctrine is known both as the negative and dormant Commerce Clause. Since SCI has chosen to use the term "dormant," we will remain consistent and use the same term.

[52] In *Tyler Pipe Indus., Inc. v. Washington State Dep't of Revenue*, 483 U.S. 232 (1987), Justice Scalia observed:

> The fact is that in 114 years since the doctrine of the negative Commerce Clause was formally adopted as holding of this Court, and in the 50 years prior to that in which it was alluded to in various dicta of the Court, our applications of the doctrine have, not to put too fine a point on the matter, made no sense.

Id. at 259-60 (Scalia, J., concurring, in part, and dissenting, in part) (citations omitted.)

There is also a substantial body of scholarly comment and criticism of the dormant Commerce Clause. One of the more exhaustive treatments of this subject is Patrick C. McGinley, *Trashing the Constitution: Judicial Activism, the Dormant Commerce Clause, and Federalism Mantra*, 71 Or. L. Rev. 409 (1992).

The modern dormant Commerce Clause analysis examines State action within the context of impacting interstate commerce on two levels. First is a *per se* rule of invalidity which considers any State law which has the effect of placing the State in a position of "economic isolation." "Thus, where simple economic protectionism is effected by state legislation, a virtually *per se* rule of invalidity has been erected." *City of Philadelpiha v. New Jersey*, 437 U.S. at 624.

The second level of judicial review recognizes that when a State acts to safeguard the health, safety, and welfare of its citizens, then, inevitably, there will be incidental burdens on interstate commerce which may be unavoidable. In these situations, the Court has adopted a more flexible approach by framing a balancing test which is best described in *Pike v. Bruce Church, Inc.*, 397 U.S. 137, 142 (1970) as:

> Where the statute regulates even-handedly to effectuate a legitimate local public interest, and its effects on interstate commerce are only incidental, it will be upheld unless the burden imposed on such commerce is clearly excessive in relation to the putative local benefits. . . . If a legitimate local purpose is found, then the question becomes one of degree. And the extent of the burden that will be tolerated will of course depend on the nature of the local interest involved, and on whether it could be promoted as well with a lesser impact on interstate activities.

As we have indicated, SCI contends that the temporary injunction constitutes "simple economic protectionism," since no West Virginia-based business is included in the universe of defendants whose mail solicitations are being scrutinized. SCI is not criticizing the Prizes and Gifts Act as not being worded in a manner that is even-handed to effectuate a legitimate local purpose; instead it is asserting that the manner in which the Act is enforced is a

de facto economic blockade of out-of-state businesses. We find nothing in this record to support a purposeful or even incidental exclusion of West Virginia businesses who are engaged in the same or similar activities as SCI.

We can only speculate that the reason the Attorney General did not join any West Virginia-based businesses was either (1) there are no businesses in West Virginia Virginia engaged in the same or similar business activities; or (2) if there are West Virginia businesses who are engaged in the same or similar business activity, then their method of doing business does not follow the same business practices as the out-of-state businesses, including SCI.

In any event, the burden of producing some credible evidence suggesting a selective enforcement of the Act would be on SCI, which it has failed to sustain.

Finally, SCI contends that even if the Act is non-discriminatory, both in terms of language and enforcement, the Act as applied to SCI imposes a burden on interstate commerce that exceeds its putative purpose and is therefore invalid. This argument requires the application of the balancing test outlined in *Pike v. Bruce Church, Inc., supra.*

SCI complains that while the Act properly promotes West Virginia's legitimate interest in protecting its citizens against misleading and deceptive sales techniques, the injunction goes too far in its reach by prohibiting not only deceptive and misleading solicitations in violation of the Act, but also representations that are wholly truthful. The breadth of the injunction, argues SCI, is "clearly excessive in relation to the putative local benefits" and thus fails the balancing test in *Pike v. Bruce Church, Inc., supra.*

The fallacy in SCI's position is that the only conduct which is restrained by the temporary injunction is conduct which violates the Act. There is nothing within the four

corners of the temporary injunction which prevents SCI from engaging in mail solicitation in a manner which does not violate the Act. The only burden imposed upon SCI by the temporary injunction is to avoid engaging in unlawful conduct. That is not a burden imposed on interstate commerce which exceeds the benefits of the Act, it is a burden that is totally contemplated by the Act.

The temporary injunction does not violate the dormant Commerce Clause.

V.

CONCLUSION

We have reviewed the temporary injunction issued by the circuit court exclusively within the perspective of W. Va. Code 46A-7-110 (1974), which manages the temporary enforcement of the Prizes and Gifts Act until a final hearing can be conducted on the merits of all the relief sought in the amended complaint.

Measured by the standards introduced in this opinion for reviewing a temporary injunction under W. Va. Code 46A-7-110 (1974), we find that the Attorney General has offered sufficient evidence to establish reasonable cause to believe that SCI is engaging in or is likely to engage in conduct proscribed by the Prizes and Gifts Act. For this reason, the decision of the Circuit Court of Kanawha County granting the temporary injunction is affirmed, with the modification that its terms shall remain in effect for a period not to exceed one hundred eighty (180) days from and after the mandate of this Court.[53]

Affirmed, as modified.

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[53] We realize that this time period may be arbitrary, particularly in view of the failure to raise this issue below. Accordingly, the time period may be extended by the trial court in its unfettered discretion.

APPENDIX B

STATE OF WEST VIRGINIA

At a Regular Term of the Supreme Court of Appeals continued and held at Charleston, Kanawha County, on the 27th day of June, 1996, the following order was made and entered:

No. 22809

STATE OF WEST VIRGINIA, by and through
DARRELL V. MCGRAW, JR., Attorney General,
Plaintiff Below, Appellee

vs.

IMPERIAL MARKETING *et al.*,
Defendants Below

SUAREZ CORPORATION INDUSTRIES,
Defendant Below, Appellant

The Court, having maturely considered the petition for rehearing and reargument filed in the above-captioned case and the supplement filed thereto, is of opinion to, and doth hereby, deny the prayer of the petitioner and doth hereby order that the final order entered herein be made absolute and certified as heretofore directed.

A True Copy

Attest: /s/ [Illegible]
Clerk
Supreme Court of Appeals

APPENDIX C

IN THE CIRCUIT COURT
OF KANAWHA COUNTY, WEST VIRGINIA

94-C-243

STATE EX REL. DARRELL V. MCGRAW, JR.,
Plaintiff,

v.

IMPERIAL MARKETING, *et al.*,
Defendants.

ORDER

The Attorney General, Darrell V. McGraw, Jr. filed a complaint for injunction, civil penalties, restitution and other equitable relief against defendants Imperial Marketing, *et al* in January, 1994 for violations of the *West Virginia Consumers Credit and Protection Act*. The complaint asserted a parens partial claim on behalf of consumers and other natural persons who were mislead by defendants' misleading and deceptive promotional schemes that fraudulently informed West Virginians that they were the recipients of valuable prizes and awards when such was not the case.

On September 2, 1994, the plaintiff focused on one defendant in particular, Suarez Corporation Industries (Suarez) in a hearing before this Court. A second hearing was held on September 7, 1994 to consider specific allegations against Suarez. On September 9, 1994, a judge in this circuit court entered a preliminary injunction enjoining defendant Suarez from conducting any solicitation activities in or into West Virginia. On September 23, 1994 the defendant filed a motion to dissolve the injunc-

tion and subsequently the plaintiff filed memoranda in opposition. This Court heard arguments and additional evidence on October 5, 1994, October 12, 1994 and October 25, 1994. This Court took judicial notice of the transcript of testimony September 1, 1994 and the exhibits therein.

West Virginia Code, 46A-7-110 provides the statutory condition for issuance of a temporary injunction as follows:

1. Violation of the West Virginia Consumer Credit and Protection Act; Chapter 46A of *W.V. Code;*
2. Unconscionable agreements;
3. Fraudulent or unconscionable conduct.

West Virginia Rules of Civil Procedure, Rule 52(a) mandates the Court to set forth findings of fact and conclusions of law in granting a preliminary injunction. Rule 52(b) allows the Court to amend its findings or make additional findings and amend the judgment accordingly.

FINDINGS OF FACT

This Court after review of all memoranda and hearing all arguments finds the following facts to be determinative.

1. Defendant Suraez Corporation Industries is engaged in the business of selling merchandise to consumers through the mail. Defendant purchases mailing lists from third parties, and use them to send mailers advertising a variety of products to prospective customers. Defendant is in competition with other similar business in West Virginia. Defendant is an Ohio Corporation with its principal place of business in Canton, Ohio.

2. Since 1990, defendant has mailed a number of promotions to West Virginia consumers by means of mass mailings. Examples of these mailers were identified as State's Exhibit #1, including subparts 1-1, 1-2, 1-3, and 1-4; and State's Exhibits #2-1, 3-1, and 4-1. All were

admitted on October 12, 1994. On or about July 11, 1994, the defendant, Suarez doing business as office of the Treasure sent a mailer to a West Virginia recipient. The mailer claims to guarantee a cash prize but the cash prize check is enclosed in a purse that the recipient must buy for $12.00 plus $2.00 packaging and insurance. State's Exhibit 4-1 Requiring payment of a fee or purchase of a good as a condition of receiving a prize is a violation of *W.V. Code,* 46A-6D.3. Similarly, defendant sent mailers that require a purchase of a product or service in order to receive a prize of money or goods in violation of *West Virginia Code* 46A-6D-3. State's Exhibit #1-1, 1-2, and 1-4.

4. Defendant Suarez in connection with the sale or solicitation for the sale of goods or services has frequently since 1990 included within its promotional materials a *simulated* or bogus check that purports to entitle its recipient to a cash award State's Exhibit 4-1 and State's Exhibit #1 West Virginia's Prizes and Gifts Act, *West Virginia Code,* 46A-6D-6 prohibits any writing which resembles a check unless its true value and purpose is disclosed. Exhibit #4-1 is such a check for $100.00 from a subsidiary of the respondent the "Department of Sweepstakes Administration." The bogus check states "Prize Claimant Voucher." There is a disclaimer in smaller type at the bottom of the check. The envelope the bogus check is mailed in states "Notice of Intent to Transfer Funds," "Office of the Treasurer." In State Exhibit #1 there is a mailing to William Knighton that also contains a bogus check. This "check" is from a subsidiary of defendant Suarez, Redemption Center, Office of Cash Distribution. The "check" is for $50.00 and states Funds Held in Escrow. There is a small disclaimer at the bottom that says "non negotiable."

5. The mailings from defendant Suarez fail to disclose the true retail value of the prize or the odds of receiving the prize. See State's Exhibit #2-1 where a 2-caret Lin-

denwold CZ Diamond stimulant is won, but no value is assigned. A $10,000.00 Grand Prize is offered, but the odds of receiving the prize are not stated. West Virginia Code, 46A-8D-4(2)(i) and (iii) require statement of the retail value of the prize to be received and statement of the odds of receiving the prize disclosed to the recipient.

A close examination of the contents of Exhibit #2-1 reveal that the defendant Suarez lists the value of items as "Comp. jewelers price using a mined diamond with similar mounting—$3,059.00." When in fact the item is a cubic zirconia in gold electroplate. This gives the recipient a deceptive value for the item and its true value is not disclosed. The recipient can order the item by paying $19.00 for the mounting.

6. Defendant on numerous occasions since 1990 has sent mailers to West Virginia consumers with similar offers to provide a "free gift," contingent on a purchase of defendant's merchandise. See plaintiff's exhibits contained within plaintiff's Exhibit #1 (Oct. —, 1994) establishes this. Defendant characterizes terms as "free" yet requires consumers to spend money to obtain it. Thus consumers mistakenly believe that they are obtaining a bargain. In fact, the price charge for the required purchase is often more than what the prize and the purchased item are worth combined. The true value of the prize is not disclosed.

7. Defendant Suarez on numerous occasions since 1990 has sent mailers to West Virginia consumers with similar announcements of a "gift" or "prize," but which contained hidden conditions. See exhibits entered at hearings.

8. Defendant Suarez has used language that would lead a reasonable person to believe he or she has won a prize. Some examples of such language mailed to West Virginians and exhibited at the hearings include:

"Entitlement Approved"

"Tied for Prize"

"You are a winner, guaranteed to receive a certified cash prize"

"Certified Cash Prize Winner"

"It is our responsibility that you understand you are a real winner in a major national sweepstakes." See State's Exhibit #1 and #1-1 through 1-4.

West Virginia Code, 46A-6D-3(b) prohibits the representation of having won unles the prize is awarded to the recipient without obligation and is delivered within ten (10) days of the representation. Defendant Suarez uses the prohibited language and then ties a payment of money in order for the recipient to claim the prize.

9. Defendant Suarez has since 1990 sent letters to recipients in this state to lead them to believe they have received important personal communications from officers of Lindenwold Jewelers. When in fact, the letters are part of a mass marketing effort intended to sell cubic zirconia mountings or glassware to many thousands of customers. Examples include:

"I was going to call you this morning. . . ." State's Exhibit No. 3-1.

"You see William, . . ." State's Exhibit No. 3-1.

"This office is the Prize Holding Division of Lindenwold Fine Jewelers." State's Exhibit No. 1.

"You may now feel free to disclose to your friends and family that you will be receiving your cash prize." State's Exhibit No. 1.

"The use of an "Official Judges Seal."

"The Department of Authorization." State's Exhibit No. 1.

West Virginia Code 46A-6D-5 prohibits representations that a person has been specifically selected unless the selection is designed to reach a particular person. De-

fendant Suarez has used this official sounding personal language to misrepresent special selection when in fact such letters go to thousands of recipients in West Virginia and other states.

10. Defendant Suarez since 1990 has sent mailings to West Virginians that proclaim a "Quality Grade/Color Analysis Report and Appraisal" on a cubic zirconia. This analysis is stated as a "Jeweler's Report on a Certificate of Authenticity." See State's Exhibit 1-3. In fact, there is no quality grade or clarity grade done by jewelers on a cubic zirconia. This mailing deceives recipients as to the value of the prize or the item to be ordered in violation of *W. V. Code,* 46A-6D-4(a)(2)(i).

11. Defendant Suarez sent solicitations from its out of state headquarters to citizens residing in various parts of West Virginia, including Kanawha County, West Virginia.

12. The aforementioned acts, insofar as they violate the West Virginia Consumer Credit and Protection Act are unlawful, fraudulent, and unconscionable.

CONCLUSIONS OF LAW

Defendant Suarez, in engaging in the activities outlined above, have violated *West Virginia Code* 46A-6D-3. The jurisdiction of this Court is invoked pursuant to *W. V. Code* 53-5-4 and *W. V. Code, Chapter 46A* and *W. V. Code,* 46-7-110. This Court has jurisdiction over the parties and the subject to grant the relief immediately prayed for.

W. V. Code, 46A-7-111 grants broad power to the Attorney General to maintain civil actions against an offender of this section and to recover, in addition to an injunction, civil penalties and refunds. Hence, insofar as the injunctive relief sought here appears to be ancillary to other relief that the state seeks, or may seek, in

the main course of action, the restrictions of *W. V. Code,* 53-5-3 are not controlling.

The requirements of notice as clarified by *Ashland Oil v. Kaufman,* 384 S.E.2 173 (1989) have been satisfied in this case.

The state does not violate *Interstate Commerce Clause* of the *United States Constitution,* nor any other provision of the constitution insofar as the state seeks to enjoin activities illegal for any person to engage in under the laws of the state of West Virginia.

Defendant Suraez has since 1990 violated *West Virginia Code* 46A-6D-6 by using simulated checks that would mislead a reasonable person and without conspicuous disclosures of the true value and purpose of such simulated checks.

Defendant Suarez has violated *West Virginia Code,* 46A-6D-4(a)(2)(i) and (iii) by not disclosing the true retail value of the "prizes" and by not disclosing the odds of receiving the "prize."

Defendant Suarez has violated *West Virginia Code,* 46A-4D-3(b) by using language that may lead a reasonable person he or she has won anything of value by using the words:

"You are a winner"

"Tied for Prize"

and the remaining words and phrases outlined above and others that may be deceptive and or misleading.

Defendant Suarez has violated *West Virginia Code* 46A-6D-5 by using personal words and phrases and authoritative labels to represent that a person is specially selected when in fact these personal and authoritative sounding mailings go to thousands of recipients.

Defendants Suarez is not exempted by *West Virginia Code* 46A-6D-10 on the grounds that Suarez is not a

membership group or club regulated by the federal trade commission rule concerning negative option plans. Nor is Suarez a continuity plan subscription arrangement or single sale or purchase series arrangement which would exempt it from prosecution under the other provisions of the *West Virginia Prize and Gifts Act*. Rather, the defendant Suarez is consistently violating the Prizes and Gifts Act with its deceptive and misleading promotions.

Based upon the foregoing Finding of Facts and Conclusions of Law the Court hereby ORDERS, ADJUDGES and DECREES as follows:

Defendant Suarez has violated specific elements of the West Virginia Consumer Credit and Protection Act Chapter 46A of the *W. V. Code* and defendant Suarez has engaged in unconscionable agreements and fraudulent or unconscionable conduct. Therefore, the Motion to Dissolve the Preliminary injunction is DENIED and instead the preliminary injunction is modified in that the defendant Suarez, its assigns, subsidiaries, officers, agents, servants, employees and representatives are hereby preliminarily enjoined from engaging in the following acts or practices:

A. Soliciting consumers in West Virginia with an offer which denominates an item as a prize, gift, award, premium, or similar term that implies the item is free whether stated or represented in any way, when the intended recipient is required to spend any sum of money to make meaningful use of it.

B. Representing to customers in West Virginia that the prize, gifts, award, premium or similarly denominated item or any good or service offered to consumers has a value in excess of the fair market value at which substantial sales of the item are made in the area where the item is being offered.

C. Representing to customers that the consumer has specific odds or chances of winning a prize, contest,

sweepstakes or similar promotion unless the specific odds or chance of winning has been numerically determined and can be substantiated prior to transmittal of the solicitation in accordance with the West Virginia Consumer and Credit Protection Act.

D. Sending to potential customers in West Virginia solicitations which use language such as "You have won" "Declaration of Cash Prize" "You are entitled . . ." "Certified winner," and making representations to solicited persons in West Virginia of having won a prize, gift or other item of value, unless the solicited person is in fact given the prize, gift or item of value, without obligation, and unless all of the conditions of the West Virginia Consumer Protection Act, *W. V. Code* 46A-6D-3 are met.

E. Sending solicitations to persons in West Virginia which use official sounding language and seals such as: *Judges Seal, Office of the Treasurer, Claim Processing Division* that may lead a reasonable person to believe he or she has won anything of value, or sending solicitations that represent that the recipient has been specially selected when in fact the solicitation is part of a mass mailing.

F. The defendant shall not send material to persons in West Virginia which includes writing which simulates a check or resembles a check or invoice in violation of the West Virginia Consumer Credit and Protection Act.

G. The defendant shall not solicit by sending to persons in West Virginia material referencing fake jewelry ratings or prize appraisals, bogus jewelers or agents who are holding prizes for the benefit of solicited customers in West Virginia.

H. The defendant is enjoined from conducting any business in the State of West Virginia that is in violation of West Virginia Consumer Credit and Protection Act, *W. V. Code* 46A-6D-3 et seq.

This Court is of the opinion that it is improper to require bond usually mandated by *West Virginia Code* 53-5-9.

The Court further ORDERS that the clerk shall send a certified copy of this Order to all parties or counsel of record. The Court notes the objections and exceptions of the party or parties aggieved by this order.

DATED: November 3, 1994

ENTER:

/s/ Herman G. Canady, Jr.
HERMAN G. CANADY, JR.
Judge

APPENDIX D

IN THE CIRCUIT COURT
OF KANAWHA COUNTY, WEST VIRGINIA

Civil Action No. 94-C-243

STATE OF WEST VIRGINIA by and through
DARRELL V. MCGRAW, JR., Attorney General,
Plaintiff,

v.

IMPERIAL MARKETING, INC., MADISON & LANE, INC., TRANSWORLD TRADING CORPORATION, OPPORTUNITIES UNLIMITED PUBLICATIONS, INC., and their officers, agents, employees, successors and/or assigns,
Defendants.

ORDER

This matter came on for a preliminary injunction hearing on February 18, 1994, before the undersigned Judge Ted Kaufman of the Circuit Court of Kanawha County, upon the pleadings filed in the case and Order to Show Cause issued by this Court, the Plaintiff being represented by Tom Rodd, Deputy Attorney General and Jill Miles, Senior Assistant Attorney General, and the Defendants Imperial Marketing, Inc., Madison & Lane, Inc., and Transworld Trading Corporation being represented by Fred Fahrenz of the Pieffer Law Firm, and the Defendant Opportunities Unlimited Publications, Inc. being represented by William Powell and Warren Upton of Jackson and Kelly; and prior to the commencement of the hearing the parties announced to the Court that an agreement had been reached whereby the Court would be asked to enter an Order with certain terms and condi-

tions and stipulations, and the same appearing to be reasonable to the Court, the agreement is approved and its terms, and conditions and stipulations are as follows:

1. As used herein, the term "Defendants" shall include each Defendant corporation, and all of Defendants" shall include each Defendant corporation, and all of Defendants' employees, officers, personnel, agents, officials, successors, subsidiaries, affiliates, parents, or other persons or entities associated with or acting on behalf of Defendants, in carrying out or implementing in any fashion "contest" solicitations and operations;

2. The Defendants agree and consent that jurisdiction over them and this case and venue for this case properly lie in this Court;

3. The Defendants agree to be and shall be and are preliminarily enjoined and restrained from the operation of and solicitation for "contest" operations in and into West Virginia, and from the acceptance of funds for participation in such "contests" from West Virginians; provided that the Defendants shall be permitted to process in said operations funds already received from West Virginians; provided, that information on all such funds processed from West Virginians, and amounts received from them, and the results of any processing and award shall be made available to the Plaintiff in a timely fashion, and shall include the information on each such West Virginian specified further hereinafter;

4. In addition to the information to be given pursuant to Paragraph Two (2), the Defendants agree to and shall within thirty days identify to the Plaintiff and to this Court, by name, address, telephone number and if known social security number, each West Virginian from whom they have received any funds over the past four years and the amount of funds received from each West Virginian identified by Defendants, in connection with any of Defendants' "contest" solicitations; all such information to

be kept confidential and not disclosed publicly without further order of the court;

5. The Clerk is directed to send a certified copy of this Order to each of the counsel of record.

So Ordered:

DATE 2/18/94

/s/ Tod Kaufman
HONORABLE TOD KAUFMAN
Circuit Judge

Prepared by:

/s/ Tom Rodd 2/18/94
TOM RODD
Deputy Attorney General

Approved by:

/s/ [Illegible]
Counsel for Imperial Marketing
Madison and Lane
Transworld Corporation

/s/ [Illegible]
Counsel for Opportunities Unlimited

APPENDIX E

IN THE CIRCUIT COURT OF
KANAWHA COUNTY WEST VIRGINIA

Civil Action No. 94-C-243

STATE OF WEST VIRGINIA, by and through
DARRELL V. MCGRAW, JR., AG,
Plaintiff,

vs.

IMPERIAL MARKETING, INC., *et al,*
Defendants.

TRANSCRIPT

[October 5, 1994]

BEFORE: Hon. Herman G. Canady, Jr., Judge

* * * *

[14] MR. RODD: Your Honor, if I could just speak on behalf of the State with my understanding of that issue. It's real simple.

We believe that we could put on against all seven of the defendants who have not agreed to a preliminary injunction a case, if the Court wanted us to do that, and we could do it in a timely fashion, if that's what the Court wanted us to do.

On the other hand, we realize that that would require a period of time that would be substantial. We think that if we were to proceed with the hearing against a couple of them, or even one, that issues would come out in that case that would be indicative that might avoid the necessity—I mean, originally a hundred-and-six defendants have been in this case.

* * * *

[16]The practical effect is that we have one preliminary hearing. A preliminary injunction was granted against one company. We are now in a position where there are only seven who are resisting preliminary relief.

THE COURT: Seven might be manageable, even if I'm swamped. You know, we've got seven judges in this Circuit, so if I can't manage it—

MR. RODD: We agree there are very common legal issues, and that the factual issues we think are extremely simple in these cases. Certain solicitations are made. If we prove that the solicitations were made, the Court makes a determination whether those solicitations are illegal.

We have done that in a preliminary injunction hearing with one of those defendants. Of course, that will come up later as we discuss that defendant, what the Court is wanting to do with respect to that defendant.

But, with respect to all of the other defendants, we think that it is manageable to proceed, to set preliminary injunction proceedings with respect to those other sorts of defendants, procedural hearing, have the Court understand the issues in that case.

[17] In fact, we believe—I remember our phone conference. The Court said that it wanted to resolve the permanent injunction question with respect to Suarez Corporation, that case, in the month of October.

THE COURT: This is a phone conference with you—

MR. RODD: With Mr. Cagle.

THE COURT: —and Cagle.

MR. RODD: In that conference the Court said it wanted to resolve the permanent injunction, mold the motion to dissolve in—

THE COURT: I haven't really stated what I want. I'm just kind of thinking out loud, exploring.

MR. RODD: I understand.

THE COURT: I don't know what—

MR. RODD: I want to just complete with that. My belief is, Your Honor, that after the hearing is held on

that defendant that there will be even less of an issue as to these additional, some of these additional defendants because the Court will be understanding the issues of solicitations, what constitutes illegality or non-illegality in the solicitation area.

I believe personally that resolving that defendant's case will also, as a practical matter, address the question of the remaining seven defendants [18] to a large extent. That's my suggestion to the Court.

THE COURT: All right. So, Mr. Lutz' client and Mr. Roncaglione's client are still proceeding and doing business as usual?

MR. RODD: We don't really know exactly what they're doing, but they certainly resisted agreeing to stop doing business. They may, as a matter of prudence, not be doing business; I don't know.

THE COURT: All right. Well, let me see—

MR. CAGLE: Your Honor, I did want to speak to that.

THE COURT: Yes, sir.

MR. CAGLE: I'll be very pointed. I have spoken with a number of the attorneys, and frankly, we agree that we probably have many different kinds of businesses, and so the issues are different with respect to virtually every one of the defendants, and that's important to my client that we keep that focus.

THE COURT: All right.

* * * *

CLOPPER-DIRECT

[36] Q Do you receive mailings in the form of offers for prizes or sweepstakes?

A Yes, from a lot of companies, but I don't all the time send them back in. I sent Lindenwold's in a couple of times. If you're going to win, you're going to win; I mean, if you're name is drawn. It's just like playing slot machines; if you're going to win, you're going to win.

Q Have you ever had any trouble at any time reading any of the literature that you've received from Lindenwold?

A No, none at all.

Q Do you find it difficult to read or follow?

A No, it's all been simple.

Q Did you ever win?

A Well, I don't know if you'd call that winning. One time I was only expecting a small package from Lindenwold, and I got a box so big with about a 13-inch television in there. Some lamps came along with it.

I called Lindenwold to find out why I was [37] getting this. I thought maybe they had made a mistake and shipped me something that was supposed to go to somebody else.

It was because I was one of the first hundred-and-fifty customers to respond on buying an item from them. They told me it was a gift from Lindenwold.

Q How long ago was that, Mr. Clopper?

A That's been about three years ago.

Q Does that TV work?

A Yes. I have it in my van. It has an AM/FM radio, television. My wife likes it. When we go to Atlantic City, she watches her soap on it. We took it clear to California, this summer.

Q Did you find anything deceptive about that which you receive from Lindenwold?

A What was that again?

Q Do you find anything deceptive about that which you receive from Lindenwold, deceiving you, tricking you, fooling you?

A No, no, no.

Q Are you happy with the quality of the merchandise you've purchased?

A Yes. I'm a hundred percent pleased.

Q And is it your desire to continue to do [38] business with Lindenwold?

A Yes. That's why I told her that the item I wanted to send it to my Maryland address. If West Virginia don't want to let it come into West Virginia, I'll have it come into Maryland. I'll still continue to buy from Lindenwold and have my mail shipped to Maryland.

Q Did you have any plans on buying gifts from Lindenwold during the Christmas period?

A If I can get a catalog from them, if they have items in there, yes, that I'd like to have. I called Kelly and asked them if they was going to have a catalog. I have three daughters and a son, and I know my girls wear earrings.

Q Did you ever have to buy anything in order to receive any gift or prize from Lindenwold Fine Jewelers?

A No.

Q Incidentally, you mentioned a while ago that you receive literature through the mail from other entities.

A Right.

Q Have you ever found the literature to be hard to understand or trickery?

A Yes, I have. In fact, one was mentioned in [39] the conversation a while ago, and I would come back for the Attorney General and be a witness for him on it, because I will not deal with Publishing Clearing House anymore.

Q Is there a difference then in the literature that you receive from Publishing Clearing House and Lindenwold?

A Yes, a lot.

Q Tell the Court how it differs, would you, please?

A Well, they do trick you into buying things from them, and I don't like the way they done me. I wanted to cancel. They were going to sue me because I wanted to cancel, and so forth, and I had to battle with them.

I've never had to battle with Lindenwold because everything I've gotten has been satisfactory to myself and my wife both. So I've had no battles with Lindenwold.

MR. CAGLE: I think that's all I have on direct, Your Honor. Thank you. This gentleman may have some questions.

THE COURT: Cross-examine.

* * * *

PERDUE-DIRECT

[75] Q What kind of items would you have purchased?

A Well, I have rings. I have a painting that I bought the frame from Lindenwold, and I have a, I bought thirty notecards and received a woven silver basket with it. Primarily it's jewelry.

Q Have you received mailings relative to sweepstakes or the right to enter some sweepstakes with Lindenwold?

A I think the way it's presented is as a drawing, that you are entered automatically if you order and purchase the offered purchase item. And if you don't want to accept the purchase item, you follow the instructions for alternative entry, and you can enter without a purchase.

Q Is that plain to you from the mailings?

A Perfectly plain.

Q Have you ever had any trouble understanding the directions?

A None at all.

[76] Q Have you ever felt that you had to buy something in order to enter the sweepstakes?

A No, sir.

Q Have you ever received any gifts or won any prizes from Lindenwold?

A No, sir, except now I did when I sent the survey back. They had said on the survey card that they had a little gift for those who returned their survey card, and so I did receive a small gift from them after I returned my survey card.

Q And is that—what you're saying is that Lindenwold has complied with their mailings?

A Oh, yes. I am perfectly satisfied, more than satisfied with the quality of the products.

Q Have you ever had to return those products to Lindenwold for any purpose?

A No, sir.

Q Have you ever had to, or did you ever purchase a product and thereafter send it back to them for any changes in sizes or amounts?

A No, sir.

Q How would you describe your feeling about Lindenwold in terms of your business transactions with them? [77] A They're prompt in filling the orders. They have good quality merchandise. I've been well—satisfied.

Q Do you desire to continue to do business with Lindenwold?

A Well, I don't buy that often, but I do like their products and if I do have the opportunity, I will probably purchase further from them.

Q Have you ever bought any gifts for relatives or friends in the Christmas season from Lindenwold?

A Yes.

Q Have you ever received any catalogs or any other brochures about the availability of products from Lindenwold?

A No, just the envelope mailings.

MR. CAGLE: Your Honor, may I approach this witness, please?

THE COURT: You may.

MR. CAGLE: I want to show you some exhibits in a series numbered 35 here. It may take a second, Your Honor, for me to find the particular exhibits, if you'll indulge me for a second.

Your Honor, do you have an exhibit book by chance? [78] THE COURT: No.

(WHEREUPON, a discussion was had off the record.)

BY MR. CAGLE:

Q Let me show you an exhibit that's identified for purposes of evidence in another proceeding as No. 35-5.

Take a second and see if you recognize that, or whether you have seen that.

A (Witness complies.) I haven't seen this particular presentation.

Q Let me flip over to that which is—before we leave that, have you ever seen anything similar to that which is 35-5?

MR. RODD: Your Honor, I think I've gotten a lot of objections throughout this proceeding so far, when I started asking people about things and they say, you know, similar to.

We've got a lot of exhibits. I think that we're getting into an area—I'm just noting that if he is to ask about similarities, I suppose I'm going to have to ask about similarities, too, just so that's noted.

Go ahead with the questioning, but I believe it should be noted, if that's what he wants to ask about.

[79] THE COURT: All right. No objection.

MR. CAGLE: All right.

BY MR. CAGLE:

Q Do you see anything which you recollect to be similar to that which is 35-5?

A You mean this article?

Q Well, both article or any aspect of the exhibit as you see it?

A Well, the front piece.

Q By the front piece, are you talking about that which says "cash"?

A The information, yes.

Q Specifically tell the Court what information on 35-5 you recall being similar to that which you have received.

A Well, the information is pretty much the same. Down here it says "alternative cash claim filing information". It says the following rules are on the back of the form.

I always read both sides. I read everything that comes in my envelope before I make a decision. I found that it tells you if you don't want to purchase, if you want to make that entry for the drawing, you can do so by following the instructions.

[80] Q Have you had any trouble reading the instructions?

A Not at all, not at all. They're perfectly understandable.

Q Let me show you that which is 35-10. Likewise, see if you have seen that particular mailing or something—

MR. RODD: Your Honor, I'm going to object to something—Mr. Cagle is going to apparently ask, did you ever see anything like this, and then ask her to characterize an experience she had with something that was "like it".

I just wonder if we're not in a position here where the State of West Virginia has introduced into evidence a lot of solicitations, I believe there are—excuse me, Mr. Cagle, and I appreciate your letting me make this point to the Judge, and I know you'll respond.

But we have introduced into evidence in support of a preliminary injunction with a bunch of witnesses, who testified that they had been misled by those specific solicitations, and an injunction was issued with respect to that evidence, and findings were made on the basis of those solicitations.

* * * *

[October 12, 1994]

* * * *

[62] DIRECT EXAMINATION

BY MR. CAGLE:

Q Would you state your full name for the record, please?

A Janice Maxine Estep.

Q Where do you reside?
A Kimberly, West Virginia.
Q And what county is that in?
A Fayette County.
Q What do you do for a living?
A I'm a teacher's aide.
Q You work for the board of education?
A Fayette County Board of Education.
Q How long have you done that?
A Are you familiar with the company, Suarez Corporation Industries, doing busines as Lindenwold Fine Jewelry?
A Yes, sir.
Q How is it that you're familiar with them?
A I got acquainted with them I think it was about 1989, 1988. I got some pamphlets, some [63] literature through the mail and I opened them up and I looked to see what was in it. I liked what I saw.
Q Have you done business with that entity?
A Yes, I have.
Q For how long?
A Five years, six at the most.
Q Tell the Court in some general terms what kind of business transactions you've had with this company?
A I have ordered rings, necklaces, a vase was a gift. I'm not sure what you call it, a flower-like you can sit it on your furniture. I think it was ceramic type. I've also ordered—gotten some earrings. Basically, I look for the rings.
Q Do you like their merchandise?
A Yes, sir.
Q Do you find it to be of good quality?
A Yes, sir, I do.
Q Have you ever given it as a gift to others?
A Yes.
Q Who?
A I gave it as a—I have given some as wedding gifts. A friend I worked with came in and [64] saw the

pages on the flowers. she liked it. She asked me if I would order it and I did and gave it to her.

Q Have you ever given it to family members?

A Yes, I have.

Q Have family members ever given it to you?

A Yes, sir.

Q What family member?

A My parents bought me rings and gave to me for a Christmas gift. I bought for my nephew, gave him a chain.

Q Janice, have you ever played the sweepstakes?

A Yes, sir, I have.

Q So the Court will understand, in your own terms, what is a sweepstake or sweepstake as it would relate to this particular company?

A Well, sometimes I would open them up. I look at the gift and forget about the sweepstakes. Sometimes I didn't want the gift, not the gift, but whatever was being offered on an order form, and I did not—if it didn't interest me, I forgot about it. If I liked it, I ordered it; if I didn't, I didn't.

[65] Nobody held a smoking gun to my head and told me to pull the trigger. It was my choice if I wanted to pull the trigger. That's my fault if I ordered something and I'm not happy with it. So if I don't like the looks of it, I throw it in the trash.

Q Have you ever just played the sweepstakes and not ordered?

A Yes, sir, I have. It said—it's plainly marked on each one, "No purchase necessary, no purchase required." I followed directions on there that said—sometimes it says three-and-half by five-and-a-half postcards. Sometimes it says three-by-five; I do that. Sometimes it says on a plain piece of paper; I do that. Sometimes there's a prize control number, I think is what it's called, maybe like PJX1, put that after your name, and sometimes it asks for your telephone number.

Q Have you ever had any trouble reading any of the mailings from Lindenwold?

A No, sir.

Q Incidentally, do the mailings come with just one document inside the envelope or multiple documents?

A Most of the time there's multiple.

* * * *

APPENDIX F

STATUTORY PROVISIONS

§ 46A-6D-1. Short title.

This article may be cited as the "Prizes and Gifts Act." (1992, c. 34.)

§ 46A-6D-2. Definitions.

As used in this article:

(a) "Anything of value", "item of value" or "item" means any item or service with monetary value.

(b) "Handling charge" means any charge, fee or sum of money which is paid by a consumer to receive a prize, gift or any item of value, including, but not limited to, promotional fees, redemption fees, registration fees or delivery costs.

(c) "Person" means any natural person, corporation, trust, partnership, association and any other legal entity. (1992, c. 34.)

§ 46A-6D-3. Representation of having won a prize, gift or any item of value.

(a) Unless otherwise provided by article six [§ 46A-6-101 et seq.] of this chapter, a person may not, in connection with the sale or lease or solicitation for the sale or lease of goods, property or service, represent that another person has won anything of value or is the winner of a contest, unless all of the following conditions are met:

(1) The recipient of the prize, gift or item of value is given the prize, gift or item of value without obligation; and

(2) The prize, gift or item of value is delivered to the recipient at no expense to him or her, within ten days of the representation.

(b) The use of language that may lead a reasonable person to believe he or she has won a contest or anything of value, including, but not limited to, "Congratulations", or "You have won", or "You are the winner of", is a representation of the type governed by this section. (1992, c. 34.)

§ 46A-6D-4. Representation of eligibility to win or to receive a prize, gift or item of value.

(a) A person may not represent that another person is eligible or has a chance to win or to receive a prize, gift or item of value without clearly and conspicuously disclosing on whose behalf the contest or promotion is conducted, as well as all material conditions which a participant must satisfy. In an oral solicitation all material conditions shall be disclosed prior to requesting the consumer to enter into the sale or lease. Additionally, in any written material covered by this section, each of the following shall be clearly and prominently disclosed:

(1) Immediately adjacent to the first identification of the prize, gift or item of value to which it relates; or

(2) In a separate section entitled "Consumer Disclosure" which title shall be printed in no less than ten-point bold-face type and which section shall contain only a description of the prize, gift or item of value and the disclosures outlined in paragraphs (i), (ii) and (iii) of this subdivision:

(i) The true retail value of each item or prize;

(ii) The actual number of each item, gift or prize to be awarded; and

(iii) The odds of receiving each item, gift or prize.

(b) All disclosures required by this article to be in writing shall comply with the following:

(1) All dollar values shall be stated in arabic numerals and be preceded by a dollar sign ($); and

(2) The number of each item, gift or prize to be awarded and the odds of receiving each item, gift or prize shall be stated in arabic numerals and shall be written in a manner which is clear and understandable.

(c) It is unlawful to notify a person that upon acceptance or response he or she will receive a gift, prize or item of value in connection with a promotion or otherwise that has as a condition of receiving the gift, prize or item of value the requirement that he or she pay any money, or purchase, lease or rent any goods or services, unless there has been clearly and conspicuously disclosed the nature of the charges to be incurred, including, but not limited to, any shipping charge and handling charges. Such disclosure shall be given:

(1) On the face of any written materials; or

(2) Prior to requesting or inviting the person to enter into the sale or lease in any oral notification.

(d) The provisions of this section do not apply where to be eligible:

(1) Participants are asked only to complete and mail, or deposit at a local retail commercial establishment, an entry blank obtainable locally or by mail, or to call in their entry toll free by telephone or other free or local calling option; or

(2) Participants are never required to listen to a sales presentation and never requested or required to pay any sum of money for any merchandise, service or item of value.

(e) Nothing in this section creates any liability for acts by the publisher, owner, agent or employee of a newspaper, periodical, radio station, telecommunications company, television station, cable-television system or other advertising medium arising out of the publication or dissemination of any advertisement or promotion governed by this section, when the publisher, owner, agent or em-

ployee did not know that the advertisement or promotion violated the requirements of this section. (1992, c. 34.)

§ 46A-6D-5. Representation of being specially selected.

(a) A person may not represent that another person has been specially selected in connection with the sale or lease or solicitation for sale or lease of goods, property or service, unless the selection process is designed to reach a particular type or types of persons.

(b) The use of any language that may lead a reasonable person to believe he has been specially selected, including, but not limited to, "Carefully Selected", or "You have been selected to receive", or "You have been chosen", is a representation of the type governed by this section. (1992, c. 34.)

§ 46A-6D-6. Simulation of checks and invoices.

In connection with a consumer transaction, no person may issue any writing which simulates or resembles:

(a) A check unless the writing clearly and conspicuously disclosed its true value and purpose, and the writing would not mislead a reasonable person; or

(b) An invoice unless the intended recipient of the invoice has actually contracted for goods, property or services for which the issuer seeks proper payment. (1992, c. 34.)

§ 46A-6D-7. Conditions for handling charges and shipping charges.

(a) It is unlawful to notify a person that he or she may or will receive a gift, prize or item of value and that as a condition of receiving the gift, prize or item of value he or she will be required to pay any money, or purchase or lease, including rent, any goods or services, if any one or more of the following conditions exist:

(1) The shipping charges exceeds:

(i) The cost of postage or the charge of a shipping service in the business of delivering goods of like size, weight and kind for shipping the gift, prize or item of value from the geographic area in which the gift, prize or item of value is being distributed; or

(ii) The exact amount for shipping paid to an independent fulfillment house or an independent supplier, either of which is in the business of shipping goods for shippers other than the offeror of the gift, prize or item of value.

(2) The handling charge exceeds the lesser of five dollars or the actual cost of handling.

(b) This section applies to all offers of prizes, gifts or items of value covered by this article where such charges are permitted. (1992, c. 34.)

§ 46A-6D-8. Action to enforce the provisions of article.

Any consumer who suffers loss by reason of a violation of any provision of this article may bring a civil action to enforce such provisions. Any consumer who is successful in an action shall recover reasonable attorney's fees and court costs incurred by bringing the action. (1992, c. 34.)

§ 46A-6D-9. Enforcement; penalties.

Any violation of this article constitutes an unlawful act or practice under the provisions of article six [§ 46A-6-101 et seq.] of this chapter, regarding fraudulent acts or practices committed by a supplier in connection with a consumer transaction and shall be subject to the enforcement provisions of article seven [§ 46A-7-101 et seq.] of this chapter. (1992, c. 34.)

§ 46A-6D-10. Exemptions.

The provisions of sections four through seven [§§ 46A-6D-4 through 46A-6D-7] of this article do not apply to

the sale or purchase, or solicitation or representation in connection therewith, of goods from a catalog or of books, recordings, videocassettes, periodicals and similar goods through a membership group or club which is regulated by the federal trade commission trade regulation rule concerning use of negative option plans by sellers in commerce or through a contractual plan or arrangement such as a continuity plan, subscription arrangement or a single sale or purchase series arrangement under which the seller ships goods to a consumer who has consented in advance to receive such goods and the recipient of such goods is given the opportunity, after examination of the goods, to receive a full refund of charges for the goods, or unused portion thereof, upon return of the goods, or unused portion thereof, undamaged. (1992, c. 34.)

§ 46A-7-110. Temporary relief.

With respect to an action brought to enjoin violations of this chapter or unconscionable agreements or fraudulent or unconscionable conduct, the attorney general may apply to the court for appropriate temporary relief against a respondent, pending final determination of the proceedings. If the court finds after a hearing held upon notice to the respondent that there is reasonable cause to believe that the respondent is engaging in or is likely to engage in conduct sought to be restrained, it may grant any temporary relief or restraining order it deems appropriate. (1974, c. 12.)